IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1541

CHARLES HOFF and CLIFFORD LAGEOLES,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
Attorneys for Petitioners
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640

Printinghouse Press (Appeals Section) 212-687-0384

INDEX

CITATIONS

Cases:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
NO.

CHARLES HOFF and CLIFFORD LAGEOLES,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles Hoff and Clifford Lageoles petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgments of the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the court of appeals is reported sub. nom., United States v. Stofsky, at 527 F.2d 237 (1975), and is reprinted herein as Appendix A (1a - 23a). The district

court wrote two opinions denying petitioners' two motions for a new trial. The district court opinions, as yet unreported, are reprinted herein as Appendices C (27a-44a) and D (45a - 50a).

JURISDICTION

The court of appeals issued its opinion on November 7, 1975. On February 26, 1976 it denied petitioners' application for rehearing and suggestion of rehearing en banc (Appendix B herein, 24a - 26a). By order of March 18, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 26, 1976. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in refusing to decide the petitioners' motions for a new trial based on newly discovered evidence of concededly massive perjury by the only government witness to implicate petitioners upon the standard of review applied in that context by every other federal court of appeals and by this Court?

2. Whether the government violated its obligation under Brady v. Maryland, 373 U.S. 83, to investigate and disclose exculpatory information within its possession and control.

3. Whether there was no evidence of the single conspiracy charged in count 1 of

the indictment, therefore requiring reversal and a new trial on all counts?

STATEMENT OF THE CASE

The facts and background of the case are set forth in the opinion of the court of appeals. We emphasize here only those points necessary to consideration and decision of the instant petition.

Petitioners Hoff and Lageoles were officers and employees of the Furriers Joint Council, a trade union of New York fur workers. Each was convicted of accepting payments of money from employers in violation of 29 U.S.C. § 186(b), and of conspiring with co-defendants George Stofsky and Al Gold in violation of 18 U.S.C. § 371 to accept such payments. In addition, Hoff was convicted of a single count of income tax evasion, in violation of 26 U.S.C. § 7201, for failing to report the receipt of such payments.1/

1/ The court of appeals' opinion was in error in stating that the petitioners were found guilty on all counts upon which they were charged (3a). Hoff and Lageoles were acquitted of conspiracy with the purpose of engaging in a pattern of racketeering activity, a charge upon which their co-defendants, Stofsky and Gold, were convicted. In addition, several counts of accepting payments and a single count of income tax evasion (as

The government sought to prove that the petitioners demanded and accepted such payments from the specified employers in return for permission to violate provisions of the collective bargaining agreement in force between the union and the fur manufacturing firms. In particular, it was alleged that the petitioners were paid not to enforce the "anti-contracting" clause of the agreement by which the employers warranted not to "contract" with non-union shops for the manufacture of finished merchantable garments.

The government introduced no evidence of a direct payment from an employer to either Hoff or Lageoles. The only evidence against either petitioner was the testimony of a single person, Jack Glasser, a labor adjuster employed by the fur manufacturers association. Glasser testified that, at the suggestion of certain employers, he arranged with petitioners that contracting violations would go unprosecuted by the union. In return, Glasser testified, he received sums of

---

1/ (Footnote 1 Continued)

to Hoff) were dismissed by the district court before the case was sent to the jury.

money from the manufacturers, parts of which he kept [2] and parts of which he distributed to one or more of the petitioners or their co-defendants.

The petitioners denied receiving payments from Glasser. They claimed that to the extent that Glasser received money from the manufacturers, he kept it all.

The entire case against Hoff and Lageoles thus turned on the jury's evaluation of Glasser's credibility. This was recognized by counsel for both the defense and the prosecution, who emphasized the point

---

2/ Glasser claimed at trial that he received only $5,000 for his role in the transactions. Joint Appendix (Court of Appeals) at 167a. References herein to J.A. are to the Joint Appendix in the Court of Appeals; references to S.J.A. are to the Supplemental Joint Appendix filed in the court of appeals based upon the second motion for a new trial. These appendices, of course, can be made available to the Court upon request; they will, in any event, be transferred to the Court if the instant petition is granted.

in their respective closing arguments (J.A. at 627a), and by the court, which emphasized the point in its charge (J.A. at 671a).

Of considerable relevance to the conflicting prosecution and defense claims of what Glasser did with the money he received from the employers was the question of the amount and sources of Glasser's wealth. Late in the trial Glasser admitted upon cross-examination that he had accumulated a fortune of over $120,000 (J.A. at 161a), despite his exceptionally low salary. Petitioners argued that Glasser had accumulated this small fortune by keeping all sums he received from employers. Glasser testified that his entire fortune derived from two inheritances his wife received from her parents in the 1940s (J.A. at 163a). Recognizing that this testimony was of "central" importance to its case (J.A. at 178a), the government called Mrs. Glasser as a witness on the government's direct case to corroborate Glasser's "inheritance" testimony (J.A. at 173a, et seq.). When the petitioners introduced probate records showing that the amount of the inheritances was no more than $3,500, the prosecutor, in his summation, argued - without any factual basis - that this was just a legal technicality and that the money probably passed through inter-vivos and under-the-table transfers (J.A. at

628a). 3/

3/ The full "explanation" of the Assistant United States Attorney was as follows:

> "I don't want to pass without mentioning the documents which the defendants put in about the inheritance with respect to Mr. and Mrs. Glasser. They substantially undermine what Mr. Glasser said at trial to this extent, to the extent that they reflect what passed at the time of death in that fashion. They say nothing about what may have passed as a result of gifts prior thereto, what trusts may have been in existence. Nothing about that. They say nothing about what the [sic] moneys were received in violation of the estate tax laws under the table by Mr. and Mrs. Glasser, or directly Mrs. Glasser. They say nothing about that. They give you an incomplete picture of documents prepared by a lawyer. You can look on the face of them. They are exhibits prepared by a lawyer, affidavits prepared by a lawyer if you ever signed one prepared by a lawyer, you will know what they look like. They give you at the very best a marginal look of what took place at that time."

This effort clearly was improper as it amounted to unsworn testimony by the prosecutor not subject to cross-examination. See United States v. Drummond,

Despite petitioners' inability at the time of trial to point to evidence proving Glasser's general perjury, and specifically his perjury on his "inheritance" story, the jury obviously was considerably troubled as to whether or not to believe Glasser and informed the court that it was deadlocked on all the Glasser substantive counts (J.A. at 684a, et seq.). It was only after the court delivered an Allen charge that the jury returned the guilty verdicts on those counts.

---

3 / (Footnote 3 continued)

481 F.2d 62 (2d Cir. 1973); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function §§ 5.8, 5.9. (Approved Draft 1971), and authorities cited therein. It undoubtedly carried undue weight with the jury because of the prestige associated with the prosecutor's office, the natural assumption on the part of the jury that the prosecutor had facts available to him on which he based his assertion, and the "legalistic" nature of the prosecutor's claim. The jury, of course, had no competence or reason to challenge this "expert testimony" by the government's lawyer - "expert testimony" which it turned out was totally untrue.

Subsequent to the trial it became clear that the Glassers had lied fundamentally and absolutely about the source of their wealth (See court of appeals opinion, 8a). New evidence demonstrated that Glasser had deposited considerable sums of money, most of it in cash, in bank accounts during the years immediately preceding and including the period covered by the indictment. Glasser continued to lie to the United States Attorney as to the source of these funds; even now it is questionable whether a creditable explanation has been given. In any event, the government now admits that the Glassers lied at trial about the source of their wealth, that they lied several times thereafter in discussing the matter with the United States Attorney, that only a minuscle portion of their wealth, if any, derived from inheritances, and that Glasser accumulated substantial sums of cash which he had received from manufacturers in a safe deposit box before finally depositing such sums in his bank accounts (J.A. at 743a - 749a; S.J.A. at A-40 - A-56).

Petitioners presented the new evidence in two motions for a new trial. 4/ They

---

4 / Not all the new evidence was available at the time of the first motion for a new trial. Substantial further evidence of the Glassers' perjury concerning the source and extent of their wealth was in the hands of the United States Attorney, who chose not to

argued that it provided substantial support for the defense theory of the case, and equally important, that it totally destroyed Glasser's credibility as a witness. 5/

4/ (Footnote 4 continued)

reveal it to the court or to the defendants until some time after the denial of the first new trial motion. When the United States Attorney did reveal the new evidence, a second motion for new trial was made.

5/ Petitioners argued that the fact that Glasser had accumulated substantial hidden sums of cash from manufacturers, which he failed to report or account for to the United States Attorney, supported their view that he kept for himself the sums which he claimed he had paid over to petitioners. This too provided the motive for Glasser's massive perjury: While the government's grant of transactional immunity protected him from criminal prosecution for his crimes, Glasser remained subject to substantial civil tax fraud penalties which well could amount to his entire fortune. Thus, it was entirely in Glasser's interest to attempt to attribute as much as possible of the payments he received from employers as going to the union defendants instead.

Finally, petitioners argued that given the skepticism toward Glasser's testimony displayed by the first jury without the benefit

The district court agreed that Glasser had committed perjury during the trial and had continued to do so in the post-trial proceedings (34a, 48a). It nevertheless denied the motions for a new trial without conducting the hearing requested by petitioners, therefore depriving itself and counsel of the opportunity to examine and cross-examine Glasser following the discovery of his massive perjury. The court of appeals affirmed the denial of the motions for a new trial.

The principal issue in the courts below was whether the massive perjury on behalf of the only government witness against the petitioners required a new trial under the prevailing federal rule requiring a new trial if the newly discovered evidence of perjury might have produced a different result at trial. Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928) and cases

---

5/ (Footnote 5 continued)

of this new evidence or the knowledge of Glasser's repeated and pervasive perjury, it blinks reality to suggest that that jury, or a new jury, would not be substantially affected when confronted with such new evidence.

cited post at 13 - 14. The courts below instead held that the applicable test was that the new evidence "would probably produce a different verdict." Berry v. Georgia, 10 Ga. 511, 527 (1851). Both the district court and the court of appeals acknowledged the question of the proper standard to be crucial to their determination of the instant case. If the Larrison standard were to be applied, both courts found that a new trial would be required (15a - 16a, 44a).

The courts below had a second related issue before them, namely, did the government violate its obligations to disclose exculpatory or material evidence to the petitioners under Brady v. Maryland, 373 U.S. 83 and Giglio v. United States, 405 U.S. 150. They resolved this issue against the petitioners, who urged the existence of such a duty particularly where the sole witness against the petitioners was a confessed criminal who had been given transactional immunity and whose testimony during and after the trial revealed massive perjury to the government itself.

The court of appeals' affirmance also rejected the petitioners' argument that a single agreement among the four defendants had not been established because there was no evidence that the petitioners were aware of the acts ascribed to the other two defendants, Stofsky and Gold. The petitioners had urged that this was a case of multiple conspiracy, if any, as attested by the fact that

the petitioners were found guilty of a conspiracy to violate one statute and the two co-defendants, two statutes. The prejudicial effect of Glasser's testimony with respect to the co-defendants was, of course, obvious.

REASONS FOR GRANTING THE WRIT

1. As the court of appeals acknowledged (14a), its holding on the appropriate standard for a new trial is in direct conflict with decisions of every other federal circuit court of appeals which has addressed the question. If petitioners had been tried in virtually any other circuit, their motions for a new trial would have been judged by the Larrison standard.[6] See, e.g., United States v. Anderson, 509 F.2d 312, 327 n. 105 (D. C. Cir. 1974), cert. denied 420 U.S. 991; United States v. Strauss, 443 F.2d 986, 989 (1st Cir. 1971), cert. denied 404 U.S. 851; United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973); United States v. Smith, 433 F.2d 149, 151 (5th Cir. 1970); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949); United States v. Johnson, 142 F.2d 588 (7th Cir. 1944), cert. dismissed, 323 U.S. 806; United States v. Briola, 465 F.2d 1018, 1022 (10th Cir. 1972),

---

6 / We have seen that both lower courts concede that, by the Larrison standard, petitioners are entitled to a new trial.

cert. denied, 409 U.S. 1108.

Indeed, the holding of the panel of the court of appeals in this case conflicts with prior decisions of the Second Circuit Court of Appeals itself. See United States v. Hiss, 107 F. Supp. 128, 136 (S.D.N.Y. 1952), aff'd 201 F.2d 372 (2d Cir. 1953), cert. denied, 345 U.S. 942; United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). One of the clearest statements of the Larrison rule came in the Polisi case:

> When the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted. 416 F.2d at 577.

Accordingly, the writ should be granted to resolve the conflict created by the holding of the court of appeals in this case and to make uniform the administration of criminal justice on this important issue in the federal courts.

2. The court of appeals' holding conflicts with this Court's unanimous approval of the Larrison standard where it

is shown that a material government witness committed perjury at trial. Mesarosh v. United States, 352 U.S. 1.

The court of appeals' effort to distinguish the Mesarosh case as "sui generis" (16a) is, with all due respect, superficial and conclusory. While Mesarosh indeed was in some ways an unusual case, it is well to consider the core principles upon which all parties and Justices agreed and from which the case preceded. Analysis of these principles reveals that, at the least, the Larrison rule must govern here.

In Mesarosh, evidence developed while the case was pending on certiorari before the Supreme Court that Mazzei, a government witness at trial, had lied at several proceedings subsequent to the trial. The new evidence did not show that Mazzei actually had committed perjury at Mesarosh's trial, nor did the government admit that he had. Thus, the new evidence did not by itself trigger that Larrison standard, which applies only when it has been proven that perjury was committed at trial. Accordingly, the government, in revealing the new evidence to the Supreme Court, moved for a remand to the district court so that a hearing could be had to determine whether Mazzei had committed perjury at trial. Cf., United States v. Flynn, 130 F. Supp. 412 (S.D.N.Y. 1955). If upon remand it was found that perjury had been committed, the government agreed that,

with respect to two of the defendants, an order of acquittal would have to be entered and, with respect to the remaining defendants, a new trial would be required if the trial judge had any "doubt in his mind" whether the perjured testimony had affected the jury's verdict. 352 U.S. at 24, n. 11 (Harlan, J., dissenting). Thus, all parties to Mesarosh agreed, at a minimum, that a new trial would be required if it could be shown that perjury in fact had been committed by a government witness at trial and that such perjury might have affected the jury's verdict. The dissenting Justices similarly were in accord. 352 U.S. at 25 (Harlan, J.) ("We do not, of course, even remotely imply that we give any tolerance to the notion that a criminal conviction found to be infected by tainted testimony should be allowed to stand.")

The Court rejected the government's suggestion to remand and instead itself ordered a new trial. It was this aspect of the Mesarosh Court's decision that perhaps was sui generis. The Court justified its order, in the absence of hard evidence that Mazzei had lied at trial, on its view that he was a compulsive liar and perjurer and that it would be fairly impossible to determine for certain whether or not he had lied at trial. 342 U.S. at 11 - 13. Rather than remand for what it believed would be a useless procedure, the Court, in effect, presumed that Mazzei had lied at trial. Once

having made that finding, it ordered a new trial because it deemed that the new evidence might have affected the jury's verdict with respect to each defendant. It was in reaction to these presumptive findings of fact that Justices Harlan, Frankfurter and Burton dissented.

The instant case in no way requires the Court to engage in the presumptions found necessary by the majority in Mesarosh. Here, unlike Mesarosh, there is no doubt of massive perjury by a government witness at the trial and at subsequent proceedings relating to his testimony at trial. Here, unlike Mesarosh, that government witness (Glasser) is the only witness to implicate Hoff and Lageoles in a criminal scheme. Thus, this case falls within the common ground held by all parties and all Justices in Mesarosh: A new trial is required because the new evidence might have produced a different result at the trial. 7/

7/ That the Mesarosh Court approved the application of the Larrison standard to cases where it is shown that a material witness recanted or committed perjury is made clear by its discussion of the matter, 352 U.S. at 12, and n. 6. There the Court, while finding it unnecessary to discuss the procedure to be followed in determining as a matter of fact whether such a recantation is genuine or whether perjury was committed, noted the difference between the standard to

3. As the court of appeals recognized in the very first sentence of its opinion, the question presented is of a recurring nature and is of great importance to the administration of criminal justice in the federal courts. Nothing is more important to the legitimacy of the judicial system and to public confidence in it than that individuals will not suffer -- or appear to suffer -- conviction and imprisonment upon untrue allegations and false evidence. Cf., In re Winship, 397 U.S. 358, 364. Where subsequent to trial it is shown conclusively that a prosecution witness committed perjury at trial on matters that might have affected the jury's verdict, it is not enought to insist upon a new trial only when the court is convinced that evidence of the perjury probably would have resulted in an acquittal. A defendant's right

---

7 / (Footnote 7 continued)
be applied on ordinary new trial motions and on motions where such a factual basis has been established. The Court cited with approval the Seventh Circuit's opinion in United States v. Johnson, 142 F.2d 588 (1944), cert. dismissed, 323 U.S. 806, and the decision of the Southern District of New York, affirmed by this Court, in United States v. Hiss, supra. Both Johnson and Hiss elucidated the distinction between Berry and Larrison new trial motions, and fully support petitioners' position herein.

to a fair trial at which the government bears the burden of proof beyond a reasonable doubt upon true and untainted evidence can only be preserved by requiring a new trial whenever it is possible that the perjured testimony, or the fact of the perjury itself, affected or would have affected the verdict. Otherwise the dignity and credibility of the government and the judiciary will be seriously undermined.

> [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124.

The court of appeals rejected the Larrison standard because it felt that it would lead to speculative decisions. We do not understand the court's preference for the Berry standard on that basis. It cannot be said that a determination whether or not new evidence "probably" would produce a different verdict at a new trial (Berry) is more or less speculative than a determination whether or not the presentation of such evidence at the first trial might have produced a different result (Larrison). As is unavoidably true with innumerable types of judicial decisions, both determinations are fraught

with uncertainties, as are, for example, determinations whether or not to grant new trials in cases where there has been "inadvertent" government misconduct. Compare United States v. Sperling, 506 F.2d, 1323, 1333 (2d Cir. 1974); United States v. Miller, 411 F.2d 826, 833 (2d Cir. 1969); United States v. Seijo, 514 F.2d 1357, 1364 and n. 9 (2d Cir. 1975). Indeed, the standard developed by the court of appeals in the latter group of cases is remarkably similar to the Larrison test. 8/ Yet the speculative nature of the Miller-Sperling-Seijo rule has not prevented the courts from acting "forthrightly" (16a) in reviewing such cases.

There also is no warrant to the court of appeals' fear that application of the Larrison rule will result in wholesale reversals based upon even the most minor evidence of perjury. Mere adherence to the

---

8/ In such cases, a new trial is required if "there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Sperling, supra, 506 F.2d at 1333.

words of Larrison would be enough to prevent such abuses; the court reviewing the new evidence must find that its effect on the original jury might have been substantial enough to avoid a conviction. Application of the Larrison standard by the other federal courts of appeals certainly cannot be said to have led to the wholesale overturning of convictions. There is no reason to suspect that the situation would be any different within the Second Circuit. And the applicability of the Larrison standard would provide a necessary safeguard against the "unsafe" 9/ adherence to final judgments of conviction obtained upon tainted evidence. This is especially true in those cases such as this where the government's case rests upon a single witness -

---

9/ The British standard for the granting of motions for new trials based on newly-discovered evidence is whether, in the circumstances of the case, it would be "unsafe" to allow the conviction to stand. Criminal Appeal Act of 1968, c. 19, §§ 2(1)(a), 7, 23. See 8 Halsbury's Statutes of England 690, 693-694, 706-707 (3d Ed. 1969).

whose perjury is conceded by the government.

4. The court of appeals further erred in finding that the government violated no duty to investigate its own files and to disclose exculpatory materials to the defense.

The government chose to grant Glasser transactional immunity in a case involving alleged corrupt financial transactions between Glasser and the defendants. Yet the government never ran an audit of Glasser's finances or even examined Glasser's tax returns. Examination of such returns would have revealed, as it did late at trial when the defendants finally were able to subpoena them, the existence of the small fortune Glasser had accumulated in major part from payments from manufacturers.

The government was well aware of the crucial importance of the issue of the source of Glasser's wealth and of the obvious impact that Glasser's tax returns might have on that issue. This awareness is demonstrated by the fact that the government was ready to call Mrs. Glasser as a witness solely on the question of the source of the Glasser fortune immediately after Glasser's testimony, and that the prosecuting attorney justified such testimony on the grounds that it related to a "central issue in the case"

(J.A. at 178a). But having recognized the importance of the issue, the prosecutor made no effort to investigate the truthfulness of Mrs. Glasser's corroborating testimony before putting her on the stand. Such an investigation, of course, would have revealed the probate records which seemed to belie the Glassers' account of the source of their wealth. And the prosecutor still failed to make proper investigations and disclosure prior to his improper effort in summation to explain away the probate records by in effect giving "expert" legal testimony on the manner in which Mrs. Glasser purportedly received her inheritance.

In this context, the lower courts' efforts to compartmentalize the government by distinguishing between the prosecution and the IRS misses the point. Petitioners do not argue that the government must review and disclose the tax returns of every witness it presents at every criminal trial; only where the source and amount of a witness' financial assets are arguable relevant and material is that duty definitively triggered. This is especially true when, as here, IRS agents were part of the prosecution team and the defendants were charged and convicted of tax evasion. See, for example, United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), where the defendants were convicted of attempted bribery of postal employees by the testimony of a single witness whom they allegedly tried to bribe. The Court of Appeals held that the witness' Post-

al Department personnel file was Brady material, rejecting the view of the district court that the prosecutor had no obligation to disclose the file because the Post Office Department was not an arm of the government:

> "We find no reference in Brady to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency. . . .[T]here is no suggestion in Brady that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities. And, of course, the Brady rule requires the government to supply evidence useful to the defendant simply for impeachment purposes." 475 F.2d at 57 (emphasis added, footnotes and citations omitted).

See also Giglio v. United States, supra, 405 U.S. at 154.

5. This case presents in a particularly revealing light the problem posed by Kotteakos v. United States, 308 U.S. 750, 769 that is, whether this was a case of multiple conspiracies, assuming that any violation of law was made out. Indeed, the record below established 14 separate agreements if it established any. The petitioners were not linked to payments allegedly made by an employer to other union officials; the record failed to show any knowledge on their part of such payments, much less participation.

A single agreement among the four defendants, Glasser, and the various manufacturers cannot be assumed unless the government has eliminated each and every hypothesis which might support independently determined actions. See Pevely Dairy Co. v. United States, 178 F.2d 363, 370 (8th Cir. 1949); Paul v. United States, 79 F.2d 561, 563 (3d Cir. 1935); United States v. Morgan, 118 F. Supp. 621, 633 (S.D.N.Y. 1953). Instead of eliminating such hypotheses, the government, through Glasser, presented a witness who attested to the individuality of his approaches. It is absurd to assume, as did the Court below, that because the four defendants were union officials in a small industry, engaged in constitutionally and statutorily protected rights of association, they conspired together to violate the crim-

inal laws.

This is particularly true of petitioners, against whom no employer appeared as a direct witness, whom the jury at first hesitated to find guilty of any substantive charge, and whom the jury found to be outside the conspiracy to violate the Crime Control Act. 10/

Indeed the jury's special findings on the purposes of the conspiracy support the conclusion that there could not be a single conspiracy. One group of defendants was found guilty of a conspiracy to violate two statutes; another group (Hoff and Lageoles) was found guilty of a conspiracy to violate a single statute. That is the antithesis of a single conspiracy, which involves an agreement by all the conspirators to commit crimes to which all subscribe even though the responsibilities for commission of particular substantive crimes (the objectives of the conspiracy) are assigned or undertaken by the different conspirators. While individuals may join a conspiracy at different

---

10/ No substantive crime against Hoff and Lageoles subsequent to passage of that statute is charged in the indictment. Petitioners co-defendants were found by the jury to have conspired with the purpose of violating that statute.

times 11/ the agreement must be one with identical objectives. See United States v. Peoni, 100 F.2d 401 (2d Cir. 1938); 2 Fave & Scott, Criminal Law (1972), p. 464; United States v. Spock, 416 F.2d 165, 179 (1st Cir. 1969); Daily v. United States, 282 F.2d 818 (9th Cir. 1960).

The prejudicial effect upon petitioners in this case is quite obvious. Had they been tried properly in separate trials for conspiracy with Glasser to violate 29 U.S.C. § 186, and for the related substantive crimes of bribery and tax evasion, only Glasser would have testified at their trial and they would not have been encumbered by the charges against Stofsky and Gold. These latter charges were prejudicial because: (1) the indictment charged much more criminal behavior than was charged against petitioners; (2) the crimes against Stofsky and Gold were more serious and different: racketeering and corruption of justice; (3) the witnesses included employers who arguably could buttress Glasser with respect to his testimony against the other defendants, Stofsky and Gold; 12/ (4) the

---

11/ See United States v. Sobell, 314 F.2d 314, 329 (2d Cir. 1963).

12/ Of the ten government witnesses at trial, only Glasser testified directly against petitioners.

accumulation of evidence gave a picture of corruption permeating the entire industry. Clearly the prejudice here was as marked as in Kotteakos v. United States, 308 U.S. 750, 769, and more injurious to petitioners because of the evidence admissible in a criminal case against their co-defendants and unrelated to their own case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
Attorneys for Petitioners
30 East 42nd Street
New York, New York 10017

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 4, 5, 6, 7—September Term, 1975.

(Argued September 22, 1975 Decided November 7, 1975.)

Docket Nos. 74-1860, 74-1869,
75-1247, 75-1253

UNITED STATES OF AMERICA,

Appellee,

—against—

GEORGE STOFSKY, CHARLES HOFF,
AL GOLD and CLIFFORD LAGEOLES,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a jury trial, Lawrence W. Pierce, *Judge,* finding (1) all defendants, officials of the Furriers Joint Council, guilty of conspiracy to accept payment from employers and to conduct the Union's affairs through a pattern of racketeering, and of accepting such payments, 18 U.S.C. §371, 29 U.S.C. §186(b), (2) defendants Stofsky and Gold guilty of engaging in a pattern of racketeering activity, 18 U.S.C. §1961(1)(B), and of corruptly endeavor-

ing to influence a witness before a federal grand jury, 18 U.S.C. §1503, and (3) defendants Stofsky, Hoff and Gold guilty of attempting to evade federal income tax, 26 U.S.C. §7201.

Affirmed.

ELKAN ABRAMOWITZ, Esq., New York, N.Y. (Michael R. Sonberg, Esq., Weiss Rosenthal Heller & Schwartzman, Paul K. Rooney, Esq., Elliot L. Evans, Esq., Rooney & Evans, New York, N.Y., of counsel), *for Appellants Stofsky and Gold.*

LEONARD B. BOUDIN, Esq., New York, N.Y. (Rabinowitz, Boudin & Standard, Stephen Barasch, Esq., New York, N.Y., of counsel), *for Appellants Hoff and Lageoles.*

JOHN C. SABETTA, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, V. Thomas Fryman, Jr., Lawrence B. Pedowitz, John D. Gordan, III, Assistant United States Attorney, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Once again in the wake of the discovery that a government witness committed perjury at trial we are called upon to strike a fair balance between the need for both integrity and finality in criminal prosecutions. Because we conclude that the perjury in issue is not of such significance as to have unfairly tainted defendants' convictions and find no merit in appellants' other points on appeal, we affirm.

On June 21, 1973, a federal grand jury handed down an

indictment naming appellants, all of whom are officers and employees of the Furriers Joint Council (the "Union"), a trade union representing New York fur workers. The indictment alleged a variety of offenses, the principal of which was a conspiracy to demand and accept payments from employers and to conduct the Union's affairs through a pattern of racketeering in violation of 18 U.S.C. §371 (Count 1) and the acceptance of payments of money from certain employers in violation of 29 U.S.C. §186(b)[1] (Counts 2-22). In addition, Count 23 charged that defendants Stofsky and Gold, the Union's Manager and Organizer, respectively, had conducted the Union's affairs through a pattern of racketeering activities in violation of 18 U.S.C. §§1961 (1)(B) and (C) and 1962(c).[2] Count 24 charged Stofsky and Gold with corruptly endeavoring to influence a grand jury witness in violation of 18 U.S.C. §1503. In addition, Stofsky, Hoff and Gold were charged, each in two counts respectively, with attempting to evade federal income tax in violation of 26 U.S.C. §7201 (Counts 25-27, 31-33). After a two-week trial the jury on February 27, 1974, found each defendant guilty on all counts[3] in which he was charged.

---

1 29 U.S.C. §186(b) reads:

"It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

2 18 U.S.C. §1961(1)(B) provides a long listing of examples of federal racketeering activity. 18 U.S.C. §1961(1)(C) specifically defines "racketeering activity" as "any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) . . . ." And 18 U.S.C. §1962(c) prohibits any person employed or associated with an enterprise affecting interstate commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

3 Judge Pierce sentenced Stofsky to 3 years' imprisonment and fines totaling $13,000; Hoff to 3 years' imprisonment and fines totaling

According to the government's theory, this seemingly wide range of transgressions actually resulted from one common enterprise: a series of arrangements entered into through a middleman whereby certain fur manufacturers[4] paid bribes through the middleman to the defendants during the period 1967-70 in return for permission to violate certain provisions of the collective bargaining agreement in force in the New York locale between their fur manufacturing firms and the Union. In particular, the Union contract contained provisions forbidding "contracting" and regulating "jobbing" practices whereby a union-shop manufacturer distributed fur skins to outside non-union production units for completion into merchantable garments. Faced with rising labor costs under the Union contract, some manufacturers sought to exploit the possibilities of employing cheaper, outside labor through use of the non-union contractors. The Union, on the other hand, maintained a surveillance system designed to detect any such violations and was authorized by the agreement to inspect the records of each union-shop manufacturer for the purpose of uncovering any such violations. A complaint by a Union agent charging a violation of the anticontracting provisions of the Union agreement could result in the imposition of heavy fines on the manufacturer or loss of protection against picketing or strikes.

To establish certain counts of the indictment (e.g., Counts 6-14, 18-22) the government relied principally on the testi-

$11,000; Gold to 2 years' imprisonment and fines totaling $10,000; and Lageoles to 2 years' imprisonment, execution suspended, and fines totaling $2,000.

4 The government separately indicted four fur manufacturers for making such illegal payments in violation of 29 U.S.C. §186(a). Three pleaded guilty and have been fined. The fourth manufacturer, Karl Schwartzbaum, was also fined following a jury verdict of guilty. We today affirm his conviction in a separate opinion.

mony of one Jack Glasser,[5] a labor adjustor employed by the fur manufacturers association, Associated Fur Manufacturers, Inc. (the "Association"), which was substantially corroborated by other evidence, including testimony by fur manufacturers, a union business agent and two attorneys who were brought into the picture by some of the defendants to assist in furnishing advice to Glasser after he had been discharged by the Association for misconduct and had come under investigation by the federal government. In support of other counts of the indictment (e.g., Counts 2-5, 16-17), the government offered the testimony of fur manufacturers regarding payments made by them directly to certain of the defendants for permission to engage in contracting without Union harassment. Since the principal issue raised on the appeal is the claim that Glasser's perjury tainted the convictions, it becomes important to keep his testimony and its relation to the other proof in perspective.

Because Glasser's duties as a labor adjustor for the fur manufacturers brought him in close contact with officials of the Union, he was in a unique position to act as a middleman in bribing Union officials to permit contracting. He testified that on different occasions during the period 1967-1970 he accepted monies from different fur manufacturers (Sam Sherman, Harry Hessel, Breslin Baker, Karl Schwartzbaum, Sol Cohen and Daniel Ginsberg) to arrange Union protection for their illegal contracting, part of which he kept and the balance of which he paid over to one or more of the four defendants. Following the payments the manufacturers who paid the monies received preferential treatment from the Union in its enforcement of the anti-contracting provisions of the collective bargaining agree-

5 The government granted Glasser transactional immunity for his part in these activities.

ment. On the rare occasions when a Union agent, apparently unaware of the illegal arrangement, filed a complaint charging contracting in violation of the agreement, the complaint was suppressed by the defendants or disposed of through imposition of a token fine.

Glasser's testimony was substantially corroborated by the testimony of one fur manufacturer, Daniel Ginsberg, to the effect that in 1969 he paid $1,000 to Glasser to secure Union permission to use contractors and that the Union agents thereafter discovered evidence of his contracting, Glasser advised that he would take the matter up with Hoff or Stofsky and "have it fixed," following which he heard nothing more about the matter. Harry Jaffee, a Union business agent, testified to receiving from Glasser 6 to 10 cash payments, each of $50 or more, for ignoring violations by two manufacturers (Schwartzbaum Furs and Chateau Creations, Inc.) of the Union agreements' anti-contracting provisions.

The arrangement between certain fur manufacturers and Glasser was terminated when the fur manufacturers association fired Glasser in 1970 after discovering that he had been used by these members as an instrument of corruption. As further evidence of the defendants' complicity the government offered Glasser's testimony that upon being asked in 1972 by an investigator of the New York Joint Strike Force, Detective Civitano, to submit to interrogation, Glasser immediately communicated with Hoff, who arranged for him to meet an attorney, Irving Anolik, Esq., who in turn agreed to represent Glasser for $2,000. Glasser also conferred with Stofsky, Hoff and Gold at the Hotel New Yorker, where they counseled him as to how he should handle himself during the interrogation. Following the interrogation he met again with Stofsky, Hoff and Gold at the Hotel Hilton in New York City, where he related to them his conversation with the Strike

Force investigator. Glasser further testified that shortly thereafter he was again called for interrogation and served with a subpoena to appear before a federal grand jury. He again met with Stofsky and Gold who, through the Union's General Counsel, obtained an attorney named Arthur Hammer to represent him. According to Glasser, Stofsky advised him "not to tell . . . anything, to take the Fifth" and that he would facilitate Glasser's receipt of his industry pension. Harold Cammer, called as a witness by the government, confirmed that at Gold's request he had recommended Mr. Hammer as an attorney to represent Glasser in the grand jury investigation.

Another fur manufacturer, William Stiel, testified to making payments of money directly to Gold in 1968 and 1969 for permission to engage in contracting. Daniel Grossman, a large scale fur manufacturer, testified to making arrangements in 1970 and 1971 with Gold and Stofsky for two payments per year of $6,000 each for continuation of Grossman's contracting activities, and to his direct payment of these amounts to Gold. During the period of the payoffs Grossman's firm was not subjected to any fines, picketing or strikes even though Gold inspected skins bearing Grossman's seal in the shop of a contractor, William Poulos, who also testified for the government.

The defense put in by all defendants was essentially the same—a denial that they had received any monies from any fur manufacturers, either directly or through intermediaries. Although the defendants did not seriously dispute Glasser's receipt of bribes from certain manufacturers, they contended that he never shared his bounty with them but must instead have retained the payments for himself. Lacking support for this theory other than their own denials, the defense on the first day of trial obtained by subpoena Glasser's 1972 income tax return,

which revealed the receipts of over $6,000 in interest payments from deposits of roughly $120,000 in several savings banks. Upon cross-examination as to the source of the $120,000, Glasser testified falsely that most of the money had been acquired by his wife through inheritance some 20 years earlier. His wife, called by the government, corroborated this false story. Although the defendants, some six days before the end of the trial, obtained a transcript from one of the Glassers' savings accounts (The East New York Savings Bank) showing that the Glassers had made a series of deposits amounting to $38,156 during the years 1967-70, which cast doubt upon their testimony as to the source of the funds, the defense did not exploit this evidence. Instead it resorted to probate records indicating that the estates of Mrs. Glasser's parents had yielded only a few thousand dollars. In this posture the issue was argued to the jury.

After trial, the Glassers' explanation regarding their bank accounts began to unravel. Drawing upon data derived from additional tax records that the government had provided to defense counsel some seven days before the completion of trial, the defense now discovered that during the period 1967-70 the Glassers had deposited a total of $61,659.05, of which approximately $57,000 was in cash. Questioned by government prosecutors, the Glassers acknowledged the falsity of their previous trial testimony concerning the extent of their 1967-70 deposits, but Glasser reaffirmed his testimony concerning defendants' complicity in the payoff scheme. Indeed, Glasser now maintained that a substantial portion of the additional sums represented what he had retained as his share of further, previously undisclosed illegal payoffs from the manufacturers after paying part of these additional payments to the defendants. Accordingly, on May 31, 1974, Judge Pierce denied defendants' motion for a new trial, pointing out:

> "It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori,* a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants."

Judge Pierce concluded that, in view of Glasser's explanation, which implicated the defendants even further in the illegal scheme, it appeared unlikely that the newly-discovered evidence would lead to a different verdict.

In the meantime, the government had commenced its own investigation into the Glassers' financial affairs. After interviewing Glasser and inspecting additional records, the prosecutors on September 12, 1974, informed defense counsel of further discrepancies in Glasser's previous explanation of the source and size of his bank deposits, revealing that Glasser had deposited additional amounts over a longer period of time (1962-1973), and indicating that his dealings with fur manufacturers may have been broader and in larger amounts than he had previously testified. The defendants again moved for a new trial. Again Judge Pierce, on June 4, 1975, denied their motion. Defendants appeal from their convictions and from the denial of their motions for a new trial.

Discussion

At the threshold it must be recognized that in the interest of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily "not favored and should be granted only with great caution." *United States* v. *Costello,* 255 F.2d 876, 879 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958); *United States* v. *Sposato,* 446 F.2d 779 (2d Cir. 1971). Indeed, the standard of review governing most instances of newly-discovered evidence, first enunciated in *Berry* v.

Georgia, 10 Ga. 511, 527 (1851), and steadfastly adhered to for over a century, is that the new evidence will not entitle the defendant to a new trial unless "it would probably produce a different verdict." See *United States* v. *De Sapio,* 456 F.2d 644, 647 (2d Cir.), *cert. denied,* 406 U.S. 933 (1972); *United States* v. *Polisi,* 416 F.2d 573, 577 (2d Cir. 1969); 8A Moore's Federal Procedure §33.04(1).

In two categories of cases, however, courts have deviated from this "probability" test and permitted new trials based upon a less exacting demonstration of the new evidence's materiality to the defendant's conviction. One line of cases looks to the existence of prosecutorial culpability in suppressing or failing to disclose the evidence in question; the other turns upon a witness's commission of perjury. As might be anticipated, appellants strive vigorously to fit their case within both categories.

1. *Governmental Culpability.*

The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction. See, e.g., *Moore* v. *Illinois,* 408 U.S. 786, 797-98 (1972); *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959); *United States* v. *Sperling,* 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975). This clearly is not such a case, however, as all parties agree that the government had no actual knowledge of the falsity of Glasser's trial testimony.

Appellants argue, however, that the prosecuting attorneys acted negligently in failing to probe more deeply into Glasser's financial affairs. The inadvertent but negligent failure on the part of a prosecutor to furnish to the defense evidence in the prosecutor's control that is of an exculpatory or impeaching nature would loosen the standard of

review relative to newly-discovered evidence and require a reversal if "there was a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Seijo,* 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Kahn,* 472 F.2d 272, 287 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); *United States* v. *Miller,* 411 F.2d at 825 (2d Cir. 1969). Furthermore, negligent suppression on the part of the government would run afoul of its independent responsibilities arising under *Brady* v. *Maryland,* 373 U.S. 83 (1963), where the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused" violates due process "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

The government's attorney acknowledged at oral argument that the newly-discovered evidence of Glasser's financial status might have proved useful to both sides at the February trial, offering to each strengths that might have been offset by countervailing weaknesses. But this hindsight appraisal does not dispose of the issue. Cf. *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir. 1968). We do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the government. Although a diligent prosecutor, in the interest of protecting himself against surprise on the part of his principal witness, might well have audited Glasser's finances before putting him on the stand, there was no obligation to do so, since the government, in February 1974, did not have reason to believe that Glasser, blessed with transactional immunity, would have any incentive to engage in falsehoods concerning his own monetary affairs.[6] Indeed, although the government

---

6 As noted *supra,* trial commenced on February 11, 1974. The defense closed its case on February 26, and the jury announced its verdict on

learned of the Glassers' 1972 federal tax return at the beginning of the trial, it did not have the facts with respect to the contents of the Glassers' savings bank deposits until the trial had been concluded.[7] Thus we cannot say that the government, prior to or during trial, acted unreasonably in failing to recognize the impeachment value of the Glassers' income tax records.[8]

February 27. The Glassers' 1972 federal tax return was made available to defense counsel as of the first day of trial and the government distributed the remaining applicable tax returns on February 20. Defense counsel employed these returns in its cross-examination of Glasser on that same day. In addition, a defense subpoena *duces tecum* served on one of Glassers' savings banks resulted in the production on February 21 of a transcript listing Glasser's deposits during the years 1967-70. The defense did not offer this transcript into evidence during trial.

7 We are unpersuaded by appellants' contention that knowledge of the information in Glasser's returns on file with the Internal Revenue Service should under the circumstances of this case be imputed to the United States Attorney as a basis for declaring that he was negligent in failing to obtain and turn over these returns to the defense. Such a rule, which would obligate the prosecutor to anticipate Glasser's perjury with respect to the source of funds from which the income reported in the tax returns was derived, would be not only extremely burdensome but of doubtful utility. See *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Nothing in the tax returns was inconsistent with Glasser's receipt of the payoffs and sharing of them with the defendants. The 1967-70 tax returns of the Glassers' which the government distributed to defense counsel on February 20, see note 6 *supra*, merely declared additional interest payments from two different savings banks. Indeed defense counsel did not subpoena records of these accounts until April 10.

8 Appellants additionally contend that a looser standard relative to granting a new trial should be applied because the government was at fault in failing, while the first post-trial motion for a new trial was *sub judice*, to disclose that following the motion it had uncovered additional Glasser bank records indicating that the explanations given by Glasser regarding the source of his savings accounts were false. However, the government, having been misled by the earlier Glasser versions, obviously did not want to be accused of furnishing additional misleading records. Accordingly it decided to defer disclosure until it had obtained and confronted Glasser with the *entire* documentary picture, which it promptly assembled and, on September 3, 1974, notified the defense. Under the circumstances, including the fact that the

The facts with respect to the defendant's own diligence in uncovering the newly-discovered evidence are materially different. It must be remembered that

> "a defendant seeking a new trial under any theory must satisfy the court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or at the latest, at trial." *United States* v. *Costello*, 255 F.2d 866, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Accord, United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802, 803 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Edwards*, 366 F.2d 853, 874 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967).

Here the transcript of the Glassers' account at the East New York Savings Bank, which had been subpoenaed by the defendants on February 13 and was available to them some 12 days before the end of trial, was actually delivered to them six days before the close of the defendant's own case. As Judge Pierce later noted this transcript "was strong evidence that Glasser was not telling the truth" with respect to Mrs. Glasser's inheritance. By recalling the witnesses to the stand, the defense could have used the transcript to recall and cross-examine the Glassers. If more time was needed to obtain additional information from the banks in question, the defense could at least have brought this predicament to the trial judge's attention and requested a continuance in order to exploit further this "strong evidence."

---

completion of the trial had eliminated the emergency that would have existed if trial had been pending, we cannot label this conduct as deliberate or negligent nondisclosure calling for application of a different standard of review.

The failure to obtain and exploit the impeaching data until after the jury had rendered its verdict offers strong support for the government's contention that the defense did not exercise due diligence in obtaining the newly-discovered impeaching evidence in time for use at trial. However, the same charge does not lie against the government, for it, unlike the defense, did not during the trial have the East New York Savings Bank transcript in possession. We cannot, therefore, conclude that the government acted unreasonably in failing either to anticipate or prepare to rebut Glasser's perjury.

We conclude, then, that Glasser's perjury is not the product of governmental misconduct justifying application of the looser standards of post-trial review governing such cases.

2. *Glasser's Perjury.*

We turn then to the issue of whether Glasser's perjury itself requires a new trial. While the *Berry* "probability" standard discussed above generally governs challenges to a previous trial based upon newly-discovered evidence, a less stringent test has frequently been voiced in response to revelations of perjury. Under that test, which appears to have had its origin in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), a new trial will be granted if, without the false testimony, the jury "might have reached a different conclusion."

Most circuits have expressed their allegiance to *Larrison*.[9] See generally, 8A Moore's Federal Practice §§33.04(1) & 33.06(1). In recent years, however, we have expressed increasing discomfort with the *Larrison* test in cases that do not involve prosecutorial misconduct, see, e.g., *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975); *United States* v. *Marquez*, 363 F. Supp. 802, 806 (S.D.N.Y. 1973) (Weinfeld, *J.*), *aff'd on opinion below*, 490 F.2d 1383 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *De Sapio*, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). This trend no doubt reflects our realization that the test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might" have acquitted. We recognize that those who have professed adherence to the *Larrison* test do not appear to share our concern over the problems arising from its speculative nature. Indeed, notwithstanding the looseness of the test, most courts have not hesitated to deny new trials in cases where they have purported to apply it.[10] However, rather

9 See, e.g., *United States* v. *Anderson*, 509 F.2d 312, 327 n.105 (D.C. Cir. 1974) (dicta), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (government witness recanted testimony); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973) (applying *Larrison* to perjury by material witness); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir. 1972) (dicta); *United States* v. *Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); *United States* v. *Smith*, 433 F.2d 149, 151 (5th Cir. 1970).

10 The decisions cited in note 9 *supra* reveal that frequently the courts circumvent the *Larrison* test by failing to recognize that the trial testimony was perjurious or had been recanted, see, e.g., *United States* v. *Johnson*, *supra*, 487 F.2d at 1279; *United States* v. *Strauss*, *supra*, 443 F.2d at 990, or by simply concluding that the *Larrison* standard remains unsatisfied. Thus, of the cases listed in note 9 in which the courts expressed their adherence to *Larrison*, only one reversed a conviction based upon subsequently-discovered evidence, see *United States* v. *Meyers*, *supra*, and even in that case the court concluded that the perjury was so serious that it would have called for a retrial under *either Berry* or *Larrison*, 484 F.2d at 117.

than adopt the *Larrison* test and violate it in application, we believe, for the reasons indicated, that the time-honored "probability" standard is the more appropriate one for determining whether perjury calls for a new trial. In addition to its other virtues the rule enables a court to act forthrightly in making its determination.

Defendants rely heavily upon *Mesarosh* v. *United States*, 352 U.S. 1 (1956), in urging upon us a more lenient standard of review in cases where a new trial is sought on grounds of perjury. But this court has noted that *Mesarosh* is a *sui generis* case, *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), involving "that rare situation where a key witness . . . had been conceded by the Government to have testified . . . in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind." *United States* v. *Rosner*, *supra*, 516 F.2d at 279-80. Moreover, we are confident that such an incredible witness would not have survived the scrutiny of *any* standard of post-trial review, including a proper application of the "probability" test endorsed by us.

Another problem that does not appear to have been the subject of explicit reported judicial consideration, at least in this circuit, in whether, in considering a motion for a new trial on grounds of perjury, the court should assume that the jury would have had before it the newly-discovered evidence not only for its probative value with respect to the issues but also to demonstrate that the witness had perjured himself with respect to that evidence, the latter being pertinent, of course, for its impeaching value. Put another way, should we, in determining whether truthful testimony by the witness would probably have changed the jury's verdict, also assume that the jury would have known that he had lied under oath about the matter?

Since the witness's credibility could very well have been a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself, see *Giglio* v. *United States*, *supra*, 405 U.S. at 154; *Napue* v. *Illinois*, *supra*, 360 U.S. at 269; *United States* v. *Seijo*, *supra*, 514 F.2d at 1363-64, we would answer this question in the affirmative. Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

Applying the foregoing, we do not believe that the revelation of Glasser's perjury would have altered the jury's verdict. The new evidence of the Glassers' bloated bank accounts is not exculpatory in nature. Glasser's receipt of monies from at least six fur manufacturers was clearly established. It is a *non sequitur* to suggest that the discovery of Glasser's receipt of larger sums of money from some source establishes that he did not pass to defendants a share of what he concededly received from the fur manufacturers. The key factual issue in dispute—whether Glasser shared payments with the defendants—would not have been affected one way or the other by this new evidence. The newly-discovered bank records, furthermore, are too general in nature to permit substantiation of the defense's theory by tracing funds from the manufacturers' hands into Glasser's exclusive coffers.[11] Moreover, since

---

11 At oral argument, it became clear that the dates of deposits and sums of money included on the newly-discovered bank statements cannot with any reasonable degree of precision be interrelated with the timing and size of payoffs flowing from the manufacturers to Glasser. Thus, the defense theory that Glasser retained all of the proceeds—obviously once rejected by the jury—still cannot be adequately substantiated.

Glasser now claims that the defendants also received their shares of these additional payoffs, it is doubtful whether defense counsel, equipped with this new information, would find it beneficial to open the door to this evidence of possible further union corruption. Without necessarily assuming the trustworthiness of Glasser's post-trial explanation, which incriminated the defendants even further than did his trial testimony, the fact remains that, if the defense explored this territory, it would face the serious risk that a jury would be even less likely to discredit Glasser's testimony despite his earlier perjury. Although the revelation of his perjury would have impeached his credibility, this aspect of his testimony could be sensibly explained: despite the grant of immunity protecting him from criminal responsibility, he still was confronted with the risk that if he disclosed the true source of his hidden wealth to the government he would be subjected to civil income tax liability, which would deplete his resources as a retiree. Thus the impeaching value of the disclosure was of doubtful value to the defense as compared with the harm that might result to the defendants by Glasser's explanation.

In sum, balancing the potential damage to Glasser's credibility against the possibility that the new proof simply would be construed as evidence of a more widespread bribery scheme than previously recognized, we cannot say that disclosure of Glasser's perjury "probably" would have produced a different verdict.

3. *Miscellaneous*

The melange of other contentions advanced by appellants fails to disclose any with sufficient merit to warrant reversal. We limit ourselves to those arguments upon which they appear to have placed their greatest reliance.

Appellants' first contention—that the indictments against them are invalid for the reason that they were handed down by the grand jury more than 18 months after it was originally impanelled—places the narrowest possible interpretation upon our previous rulings in *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974), and *Wax* v. *Motley*, 510 F.2d 318 (2d Cir. 1975). Appellants argue that the grand jury was convened pursuant to Rule 6, F.R.Cr.P., and therefore could not have been extended pursuant to the terms of the Organized Crime Control Act of 1970, 18 U.S.C. §3331, beyond the 18-month term to which a Rule 6 grand jury is limited. We disagree.

The record amply supports the conclusion that this grand jury was impanelled pursuant to the Organized Crime Control Act of 1970, which permits an impanelled grand jury to be extended up to 36 months, and that it was lawfully extended beyond the date when the indictments were filed. Although the order of the late Chief Judge Sidney Sugarman, which impanelled the grand jury, was facially ambiguous in that it did not expressly state that the grand jury was being impanelled pursuant to 18 U.S.C. §3331, it did not refer to Rule 6 or contain the usual reference limiting the life of a Rule 6 grand jury to 18 months. The order was not obtained at the instance of the United States Attorney, which would be the case if the grand jury were convened pursuant to Rule 6, but upon the application of the Special Attorney of the Department of Justice who was then the Attorney-in-Charge of the New York Joint Strike Force on Organized Crime and Racketeering. Furthermore, when the grand jury, one month after Judge Sugarman's order, was convened, impanelled and sworn in by United States District Judge Dudley B. Bonsal, presiding for the district court, he expressly instructed the jury that it had been impanelled under the Organized

Crime Control Act of 1970 and notified the grand jury that its term could be extended beyond 18 months for periods of 6 months up to a maximum of 36 months. He further informed the grand jury that it had additional powers not normally conferred upon grand juries. Thereafter the term of the grand jury was extended by orders of the district court beyond the 18-month period pursuant to 18 U.S.C. §3331(a). It is clear that Judge Sugarman's order, viewed in context, was intended to and was issued pursuant to the terms of the Organized Crime Control Act of 1970.

Defendants' next contention—that the evidence showed a number of separate conspiracies rather than the one single conspiracy charged in the indictment—must likewise be rejected. The evidence established a continuous course of conduct in which a number of fur manufacturers, acting through Glasser as middleman, engaged in the corruption of the defendants as key members of the Union. Each of the defendants appreciated that the illegal arrangements and payoffs to which he was a party were part of this ongoing scheme involving others. As responsible officials of the Union, appellants shared interrelated duties and worked closely together. Their participation over a period of time in the corrupt scheme was evidenced by numerous acts, including the joint approval by Stofsky and Gold of Grossman's violations of the Union agreement, the involvement of Hoff in the same violations, the association of each defendant with payoffs made by more than one fur manufacturer,[12] Gold's statements to Grossman indicating knowledge of payoffs by others, the joint determination of Hoff and Lageoles not to prosecute certain contracting com-

12 Gold was shown to have received payoffs from six fur manufacturers, Hoff from four, Lageolis from two and Stofsky from one. Stofsky also authorized Grossman's violations and participated in the decision not to prosecute Ginsberg's firm.

plaints or to conduct the examination of certain fur manufacturers' books, and the efforts of Stofsky and Gold to induce Glasser not to give any harmful evidence when he came under federal investigation. Viewed in toto the evidence was more than sufficient to establish one single conspiracy. See, e.g., *United States* v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974); *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Edwards*, *supra*, 366 F.2d at 867; *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Evidence regarding Glasser's payments to Jaffee, which were in furtherance of the conspiracy, was properly admitted, *United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 943 (1974), as was Glasser's testimony regarding fur manufacturers' overtures to enter the illegal payoff arrangements in exchange for permission to violate the Union agreement's contracting prohibition, see *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975).

Appellants next object to the prosecutor's comments in summation to the effect that, although the fur manufacturers from whom Glasser testified that he had received payoffs had not been called by the government, they were available for subpoena by the defendants to testify at trial. Since the defense had opened the door in this regard by suggesting in summation, notwithstanding efforts by the prosecutor to obtain a directive that neither side be permitted to comment on the subject, that an inference adverse to the government might be drawn from the government's failure to introduce these witnesses, the prosecutor's argument was not improper. See *United States* v. *Deutsch*, 451

F.2d 98, 116-17 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972). Nor was the government obligated to grant immunity to the fur manufacturers so that they could be called to testify. See *Morrison* v. *United States,* 365 F.2d 521, 524 (D.C. Cir. 1966); *United States* v. *Bautista,* 509 F.2d 675, 677-78 (9th Cir. 1975).

The record discloses ample evidence of payoffs which, viewed in the light most favorable to the government, support the convictions of Stofsky, Hoff and Gold for income tax evasion in violation of 26 U.S.C. §7201. The failure of the government to afford them an administrative conference with the IRS before indictment did not nullify the grand jury's actions. The grand jury's broad powers to investigate and to indict on the basis of evidence which disclosed reasonable grounds for belief that the defendants violated 26 U.S.C. §7201, are not conditioned upon the taxpayers being given an opportunity to explain their conduct to a government official any more than to the grand jury itself. See *United States* v. *Daly,* 481 F.2d 28, 30-31 (8th Cir.), *cert. denied,* 414 U.S. 1064 (1973); *United States* v. *Goldstein,* 342 F. Supp. 661 (E.D.N.Y. 1972). Furthermore, the IRS regulation providing for such administrative conferences, 26 C.F.R. §601.107(b)(2), was not in effect at the time of the filing of the indictment.

Similarly a sufficient evidentiary basis existed to support the convictions of Stofsky and Gold for obstruction of justice in violation of 18 U.S.C. §1503. Their conduct went beyond merely suggesting to Glasser that he had the right to invoke the Fifth Amendment. The trial judge, furthermore, instructed the jury that such advice would be insufficient to provide the necessary corrupt intent. In addition, the evidence established a concerted effort corruptly to persuade Glasser to remain silent in order to conceal the conspiracy and the payoffs. This proof was plainly sufficient.

See *United States* v. *Cioffi,* 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied,* 419 U.S. 917 (1974).

We have examined the other grounds urged by appellants for reversal and find them meritless.

The convictions are affirmed.

APPENDIX B

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

----------x

United States of America,

Plaintiff-Appellee,

74-1860

-v-

George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles,

Defendants-Appellants.

----------x

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants Charles Hoff and Clifford Lageoles, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, Chief Judge

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

Present: HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. TIMBERS,

Circuit Judges.

----------x

United States of America,

Plaintiff-Appellee,

-v- 74-1860

George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles,

Defendants-Appellants.

----------x

A petition for a rehearing having been filed herein by counsel for the appellants, Charles Hoff and Clifford Lageoles

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX C

Opinion of Lawrence W. Pierce, *D.J.* re: Motion for New Trial, Dated June 12, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 614

UNITED STATES OF AMERICA

—v.—

GEORGE STOFSKY, et al.,

Defendants.

APPEARANCES:

WEISS, ROSENTHAL, HELLER & SCHWARTZMAN
295 Madison Avenue
New York, New York 10017
By: ELKAN ABRAMOWITZ, ESQ.

and

PAUL K. ROONEY, ESQ.
521 Fifth Avenue
New York, New York 10017
Attorneys for Union Defendants

PAUL J. CURRAN, ESQ.
United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

By: JOHN SABETTA
Assistant United States Attorney
Attorney for United States of America

LAWRENCE W. PIERCE, *D.J.*

MEMORANDUM OPINION

After a two and one-half week trial ending February 28, 1974, defendants Stofsky, Hoff, Gold and Lageoles, officials of the Furriers' Joint Council, a labor union, were convicted by a jury of accepting payoffs from fur manufacturers and of other federal crimes related to the pay-off scheme. They have moved for a new trial pursuant to Fed. R. Crim. P. 33, citing newly-discovered evidence concerning the personal finances of one of the government's chief witnesses, which directly controverts the witness' testimony at trial with respect to the source of his small fortune. Defendants assert two theories in support of the motion: first, that the new evidence conclusively establishes that the convictions were based on perjured testimony, mandating a new trial; and, second, that the government had a duty to discover the true state of the witness' finances and to disclose it, and that its failure to do so requires a new trial. For the reason set forth below, the motion is denied.

Background

The jury trial commenced on February 11, 1974. The indictment charged that the defendants accepted a continuing flow of pay-offs during 1967 through 1970 from certain fur manufacturers in return for permission to circumvent terms of the union contract prohibiting overtime and subcontracting. The government presented three witnesses who testified as to the pay-offs. Two were manufacturers who said they made payment directly to Stofsky and Gold. The third was Jack Glasser, a former labor adjuster for the trade association which represented the manufacturers who were parties to the contract with the union. Glasser's testimony, given under the umbrella of

transactional immunity, was that he served as an intermediary, negotiating the amount and frequency of the payments, collecting the money from the manufacturers involved, and delivering the cash payments to various of the four defendants, keeping a share for himself. He testified that altogether the scheme involved a total of around $16,000, of which he kept about $5,000. He also testified that he never banked his share, but simply spent it as he received it.

There was testimony at the trial with respect to the fur garment industry in New York City which tended to provide a circumstantial background in support of Glasser's story. The jury heard that the industry is relatively small and contained geographically; that its labor requirements are seasonal; that the union's contract protects workers by requiring extensive benefits from the manufacturers, and by forbidding manufacturers to meet their excess labor needs with overtime or subcontracts to non-union shops. The defendants introduced some evidence to the contrary, but the jury could have reasonably concluded that the contract created a hardship for some manufacturers who sought ways to circumvent it. From that premise the jury could have reasonably inferred that if the manufacturers would pay-off anyone for protection against union enforcement, it would be union officials charged with enforcement.

Both in the trial at issue here, and in proceedings involving a related indictment against manufacturers charged with making the pay-offs, 73 Cr. 616, there was ample corroboration of Glasser's testimony that the manufacturers did violate the contract and that they paid the money to Glasser for that privilege with the assumption that it was going to union officials. This critical assumption was circumstantially supported by evidence that these particular manufacturers suffered little union trouble during the period when they were breaking the contract and making

the pay-offs. But, aside from the circumstantial evidence as to the nature of the industry and the payees' lack of union problems, Glasser's testimony with respect to his subsequent payments to these defendant union officials was virtually uncorroborated. In fact, Glasser testified that no payment was ever witnessed. He said he merely carried the cash around until he encountered the designated official to whom he would palm the payment, whispering the name of the manufacturer involved.

Altogether, in the trial of the union officials, seventeen substantive counts involving payments to these defendants went to the jury. Six counts involved payments unrelated to Glasser and were supported by the testimony of two manufacturers who made direct payments to two of the four defendants. Ten counts rested entirely on Glasser's testimony. One count was partially supported by the testimony of the manufacturer involved who said that he paid Glasser, but did not have actual knowledge of Glasser's payment to the intended union official. Likewise, the three manufacturers who pleaded guilty to Indictment 73 Cr. 616, disavowed any actual knowledge of Glasser's subsequent transmission of their payment to union officials.

And therein lies the crux of both the theory of defense adopted by the four union officials at trial and of their motion for a new trial.

The defense attempted to develop at trial that although Glasser might have taken the payments from the manufacturers, and even had led them to believe he was using the cash to pay-off union officials on their behalf, he was in fact pocketing all of the money given to him by the manufacturers. The theory held that Glasser's scheme was viable because the union had a small enforcement staff incapable of catching more than a handful of contract violations under any circumstances. Thus, the defendants posited, Glasser "conned" the manufacturers into believing

that pay-offs were necessary to fend off the union, and counted on the inability of the union to police the contract to give his scheme the appearance of continuing credibility.

Glasser was motivated to lie about the payments to union officials, defendants asserted, by his desire to avoid federal prosecution and his bitterness over loss of his pension benefits when he was terminated by the trade association for whom he worked.

Apparently in pursuit of these lines of defense, just prior to the opening of the trial, defendants subpoenaed Glasser's federal income tax returns for the years 1967 through 1972. Glasser claimed all had been destroyed except his 1972 return which he produced. It revealed a large interest income, the bulk from the East New York Savings Bank. During cross-examination on February 13, 1974, defense counsel, using the 1972 return, elicited testimony from Glasser that his personal wealth totalled some $120,000. On further questioning he said the money was chiefly from his wife's inheritance of many years ago. On that same date, defendants subpoenaed the East New York Savings Bank's records of the Glassers' account, and moved orally for production of the remaining returns. The Court requested an offer of proof.

On February 15, 1974, following a showing which focused more on impeaching possibilities than on substantive matters, this Court granted defendants' demand for production of the remaining original returns from the IRS files. With the cooperation of the government and Glasser, the order was expedited and the returns produced on February 20, 1974. The East New York Savings Bank records were produced at the latest on February 21, 1974, and revealed that the Glassers had deposited $38,000 in savings accounts there during the years 1967 through 1970, the period of the pay-off scheme.

Defendants commenced presentation of their case on February 21, 1974. They rested on February 26, 1974, without recalling Glasser, without a request for a continuance and with little if any reference to Glasser's bank accounts or income tax returns. They did produce probate records which suggested that Mrs. Glasser's inheritance was not anywhere near the size of the $120,000 nest-egg about which Glasser had testified. On summation, defense counsel vigorously attacked Glasser's credibility, using among other items, the probate records and the revelations from the 1972 tax returns. He fully set forth the defense theory. As noted above, after due deliberation the jury convicted on all counts submitted to it.

The New Evidence

On April 22, 1974, having requested an adjournment of sentence for post-trial preparation, defendants filed this motion. It asserts that since March 7, 1974, when they first received the actual deposit slips from the East New York Savings Bank, the defendants have discovered that during 1967 through 1970, the Glassers deposited some $57,000 in a series of frequent cash transactions in three separate New York banks: the previously noted $38,000 in the East New York Savings Bank; $12,500 in the Greenwich Savings Bank; and $7,300 in the Emigrant Savings Bank.

On May 24, 1974, the government having requested an adjournment of sentence in order to prepare a response, filed extensive papers in opposition to the motion. The government's affidavit states that the Assistant United States Attorney responsible for the prosecution interviewed Jack Glasser and his wife on May 3, 6, 13, and 14, 1974. During the course of these interviews the Glassers revealed to the government for the first time that they had received cash

funds from a variety of sources during the period of time in question. These sources included, according to Glasser, his share of illegal payments to union officials far beyond the scope of the scheme Glasser had previously described to the government or to the jury.

Glasser stated that his share of these additional payments was around $7,000 for each of the years in question. The rest of the $57,000 was explained by the sale of jewelry; Christmas gifts from manufacturers; wholesale commissions; vacation gifts from manufacturers overtime committee payments; and miscellaneous commissions. Other errors in trial testimony by both Glasser and his wife were attributed to failure to understand the questions put by counsel.

In addition to the affidavit just described, the government has also filed an *in camera* submission consisting of a government file memorandum on the discussions with the Glassers. It differs, in the main, from the public affidavit in its detail with respect to the additional illegal pay-offs, setting forth names, dates and circumstances involved in each, as related by Glasser. The government has requested that such document be sealed and made a part of the record in this case, asserting that disclosure at this juncture would seriously compromise future government investigations. In the Court's view this is a well-founded request and the document has been sealed by Order of the Court dated June 6, 1974. However, it is appropriate at this time to disclose to defense counsel that the sealed affidavit reveals that Glasser now says he originally told the government only of payments from manufacturers to union officials which he had reason to believe the government already knew about; and that at the recent interviews, he and his wife initially told the government that the cash deposits could be explained, in total, by jewelry sales. These additional facts as they bear on Glasser's credibility have been taken into account here.

Thus, since trial, the following evidence has been developed:

1. Glasser made a series of cash deposits totalling more than $57,000 during the period of the pay-off scheme. This directly contradicts his trial testimony that most of his $120,000 fortune came from his wife's inheritance some years ago.

2. Glasser has explained the source of the $57,000, by stating that at least $20,000 of its represents his share of even more pay-offs during the critical period. This directly contradicts his trial testimony that the scheme totalled $16,000 and his share totalled $5,000, and that he never banked any of it. But in the process it further implicates the defendants in the scheme for which they have been convicted.

The government does not contest the veracity of the defendants' documentary evidence, and concedes that Glasser's testimony about these matters was false in many respects.

The Court concludes that a government witness has engaged in an effort to conceal information, and has given false, or deliberately misleading testimony with respect to the source of his savings.

But, new evidence revealing that a witness has testified falsely as to some matters, standing alone, is not enough to mandate a new trial. Before this Court can proceed to the merits, the defendants must show that "the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered [by them] before or, at the latest, at trial." *United States* v. *Costello,* 255 F.2d 876, 879 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958). Then, the ultimate result depends upon analysis

of the new evidence and the false testimony, and the materiality of both. The standard of materiality required, in turn, depends upon the degree to. which the government can be said to have been involved in the suppression, if any, of the evidence or responsible for the false testimony.

Due Diligence of Defendants

In retrospect, it would appear that the key to the "new" facts was in defense counsel's hands from the moment Glasser was cross-examined about his 1972 tax return early in the trial, or at the latest when counsel finally viewed the transcript of the East New York Savings Bank accounts on February 21, 1974, and saw that $38,000 (almost a third of what Glasser had earlier told him represented the total Glasser fortune) had been deposited in frequent transactions from 1967 through 1970. While at that time counsel did not know that the deposits were cash, it was still strong evidence that Glasser was not telling the truth with respect to the inheritance. But, this Court is not prepared to say that trial counsel in a complex, demanding case is bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion. Cf. *United States* v. *Keogh,* 391 F.2d 138, 147 (2d Cir. 1968). Nor does this Court believe that counsel's inadvertence was deliberate trial strategy as the government suggests. It is conceivable, of course, that counsel veered away from further direct inquiry with respect to Glasser's wealth, fearful of eliciting before the jury the damaging explanation which Glasser has now given. But, if that were the case, the probate records which counsel did introduce on the same issue presented somewhat the same risk.

In any event, the issue of due diligence is close enough, and the matter of Glasser's performance serious enough, that a resolution on the merits appears to be appropriate and necessary.

The Government's Duty

There are a multitude of standards current in the law for testing the merits of a new trial motion. They range from the very liberal, where a defendant need show only that with the new evidence, or without the falsehoods, the jury in the case already tried "might not have convicted";[1] to the very strict, where the defendant must show that with the new evidence, or without the falsehoods, a jury on a retrial would "probably reach a different verdict."[2] In large part, the standard to be applied depends upon whether the defendant can show that the government is somehow responsible for false testimony, or that it negligently failed to disclose evidence, or that it deliberately suppressed evidence.[3]

The defendants here do not contend that the government instigated Glasser's false testimony, or that the government knew Glasser's testimony to be false. They do not argue that the government possessed the cash deposit slips and deliberately, or negligently suppressed them. Instead, they assert that the government possessed Glasser's federal tax returns, and that under the circumstances the prosecutor should have recognized their high value to the defense and turned them over to the defendants pursuant to the principles of *Brady* v. *Maryland,* 373 U.S. 83 (1963). More generally, characterizing the state of Glasser's finances as a central issue in the case, defendants urge that the government had an obligation to conduct a pre-trial investigation of Glasser's veracity with respect to these matters irrespective of what it possessed or did not possess. For the latter proposition, the defendants invoke *Brady* but cite only *People* v. *Maynard* (Sup. Ct. N.Y. Cty.), N.Y.L.J., Vol. 171, No. 64, p. 18, col. 7, April 3, 1974.

That Glasser's financial position and thus his underlying records could be seen as relevant to this case is not a wholly frivolous proposition. The state of a key witness' finances was said to be something "the prosecutors properly required . . . to be investigated" in *United States* v. *Keogh,*

supra, 391 F.2d at 142, in a case involving precisely the same theory of defense as defendants have asserted here. But neither this dictum in *Keogh,* or *Brady,* or any other authoritative case cited by defendants requires such an investigation. The requirement is that the prosecution must disclose exculpatory information in its possession. It is from possession, however buried, forgotten or overlooked, that the prosecution's obligation arises.

The defendants say that the "government" possessed Glasser's tax returns. They offer no support for that assertion, and it would appear that what they mean is that the "government at large" possessed the returns on file with the Internal Revenue Service. Given the strong public policy with respect to secrecy of federal income tax returns, this Court declines to hold that the tax returns are in the constructive possession of the prosecutor merely because they are on file with the IRS.

Furthermore, even if the government had possessed Glasser's tax returns, it is not at all certain that the value to the defendants of these documents would have flagged the prosecutor's attention sufficiently to require him to turn them over. Of course, it is easy now to point out that he would have seen the size of Glasser's interest income, and surmised the size of Glasser's small fortune. In hindsight, mainly because Glasser lied about the source of the savings on the stand, this information is perceived as of some value to the defendants. But, its practical materiality is still highly questionable and in this Court's view it is not of such a nature as to have mandated pretrial disclosure. The Court is not persuaded by the government's argument that it would violate public policy to provide such information to the defendants, under any circumstances. If the returns had been possessed, and if the portion with respect to savings interest had alerted the prosecutor, the returns themselves need not have been turned over in order

to have provided the information. Further, it should be noted that tax returns are not entirely sacrosanct, once a proper showing has been made to a Court, as demonstrated by this Court's order to produce them during trial. In that light, it is perhaps noteworthy that defendants' trial demand contained the first showing in this proceeding of the importance of this issue to the defense. Their pro forma discovery motion for Glasser's "bank statements, bank books, diaries, notes, memoranda, and other relevant documents . . ." (Defs' Motion for Discovery, ¶ 8 July 18, 1973) did not include tax returns, and was denied by the Court as entirely unsupported.

The Standard

Having found no prosecutorial misconduct, this Court is of the view that the applicable test is the formulation set forth in *United States* v. *DeSapio,* 435 F.2d 272, 286 (2d Cir. 1970), *cert. denied,* 402 U.S. 999 (1971), and reiterated in a line of cases, including *United States* v. *DeSapio,* 456 F.2d 644, 647 (2d Cir.), *cert. denied,* 406 U.S. 933 (1972): Is the evidence of such a nature that it would "probably produce a different verdict in the event of a retrial."

But, the government has suggested a test more liberal to the defendants, as set forth in *United States* v. *Marquez,* 363 F. Supp. 802, 806 (S.D.N.Y. 1973), *aff'd without opinion,* 489 F.2d 753 (2d Cir. 1974), to wit: Would the new evidence, or the lack of the perjured testimony "have produced a different verdict [at the completed trial]." Inasmuch as the result is the same under either test, the Court will apply both.

Discussion

The new evidence produced by the defendants demonstrates that Glasser lied about the source of his savings,

and it affirmatively shows that a portion of those savings has been recently deposited in cash.

The defendants do not seriously argue that it is *this* false testimony, or that it is the failure to state *this* "truth" about the cash deposits, which convicted the defendants. Standing alone, these matters are collateral to the elements of the offenses charged against these defendants. Instead, they seek to elevate the collateral to a level of materiality by asserting that "the source of these cash deposits could be explained only by concluding that Glasser perjured himself when he testified that he gave any of the monies to one or more of the defendants." Thus, they contend that the new evidence establishes that Glaser lied about what is, without doubt, the most material portion of his testimony. The new evidence establishes no such proposition. It does not directly address Glasser's testimony with respect to payments to the defendants, nor does it lead inevitably to the conclusion that Glasser lied about the pay-offs to the defendants. It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori,* a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants. On the contrary, the figures alone are so incongruous as to lead to no conclusion at all.

The defendants themselves, in other portions of their papers, state the wholely sensible premise that this new evidence "would indicate to a jury that there were much larger payments and/or payments from many additional sources." Even without Glasser's subsequent explanation, these two inferences of other or larger payments, or both, could have occurred to the jury, and would not have necessarily or "probably" produced a different verdict. Applying the stricter test of probable effect at a new trial, it is likely as the matter has evolved to the present, complete with

Glasser's explanation inculpating the defendants, that no defense counsel would actually attempt to use the evidence of the cash deposits as substantive support for the defendants' theory. The risk inherent in exposing the jury to Glasser's damaging explanation would be great.

The defendants also suggest that this evidence can be viewed as capable of destroying the credibility of Glasser solely because it shows him to have lied about the source of his funds. Under the strict test, it is still doubtful that it would produce a different verdict on a retrial. Glasser would not obligingly repeat his earlier false testimony just to provide defense counsel with the opportunity to impeach him with this new evidence. The government could not permit it in any event. It is possible, of course, that counsel could attempt to exploit this entire episode so as to seriously damage Glasser's credibility, but, again, it is difficult to imagine how it might be done without raising the spectre of a far wider, broader scheme involving these defendants.

Under all of the circumstances, the strongest argument the defendants advance is the probable impeaching effect of the new evidence, if it had been produced at precisely the right moment at the trial just concluded. That "right" moment could only have been after Glasser had testified falsely on the subject. Then, the question is, would proof that he had lied about his savings have dealt a blow to his credibility so serious as to have probably led the jury to totally discard his testimony with respect to payments to the union officials?

Assessment of a jury's view of credibility is speculative at best. But several factors lead this Court to conclude that this evidence would not have destroyed Glasser to the extent that the verdict of the jury would have been different. As it was, the jury had evidence from the probate records which established that the inheritance story was not true. And although that evidence did not supply the

jury with an explanation of where the money did come from, it must have demonstrated that Glasser had not told the truth about the source of the $120,000. There is no doubt that evidence of the recent cash deposits would have had a dramatic impact. But, in this Court's view, it would not have changed the quantum of the impeaching effect.

In addition, the jury had totally independent evidence to support Glasser's story which would have remained unsullied. Two manufacturers had testified as to direct payments made to some of these defendants. One manufacturer had testified that he gave money to Glasser with the understanding that it was going to union officials. A non-defendant ex-union official had testified that he accepted money from Glasser under similar circumstances. Also the jury heard evidence of the small and tightly circumscribed fur industry from which they might well have reasoned that the story Glasser told made sense, however untruthful he had been about the source of his fortune. Further, the jury could have reasoned from the same industry evidence that the basic flaw in the defense theory was that if Glasser knew the union lacked the manpower to enforce the contract, then all of the manufacturers must have also known. Put another way, it was reasonable for the jury to conclude that the manufacturers would not have continued to pay Glasser during a period of at least three years, unless they knew that it was necessary to pay-off union officials in order to circumvent the contract, and they were convinced that he was, in fact, so doing with their money.

Given all of these factors, this Court cannot conclude that if the jury in the trial just completed had known of this new evidence of cash deposits, or the fact that Glasser lied about the source of his savings, it would probably have reached a different verdict, an acquittal; or that this

new evidence would probably produce an acquittal on retrial.

The motion for a new trial is hereby denied. The defendants' accompanying motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c), is hereby denied.

SO ORDERED.

Dated: New York, New York
June 12, 1974

LAWRENCE W. PIERCE
U.S.D.J.

FOOTNOTES

1. This liberal test is a modification of the classic test set forth in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), which involves a post-trial revelation that a conviction was based on false testimony. See *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969). This test has apparently been limited to cases involving prosecutorial misconduct in this Circuit. *United States* v. *DeSapio*, 435 F.2d 272, 286 n. 14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). It is also a variation of the applicable test for negligent nondisclosure of evidence which was in the government's possession, as set forth in *United States* v. *Houle*. 490 F.2d 167, 170 (2d Cir. 1973), which requires an assessment of ". . . whether . . . there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

2. The strict standard is reserved for motions which can be viewed simply as based on newly discovered evidence and free from prosecutorial misconduct. See, e.g., *United States* v. *DeSapio, supra; United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972).

3. Where the reliability of a given witness might well be determinative of guilt or innocence, and where the government had in its possession information which demonstrated that the witness had not told the truth on the stand, and did not turn it over to defendant pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court has said that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), *citing*, *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). Or put another way, as it has been by the Second Circuit in *United States* v. *Mele*. 462 F.2d 918, 924 (2d Cir. 1972), the standard under *Giglio* is "whether the evidence is material and could in any reasonable likelihood have led to a different result on retrial."

4. Actually, the government has suggested that ". . . the defendant must establish that the testimony was of such a character that it probably would have produced a different *conclusion*" (emphasis added). Gov'n Memo in Opposition to Motion for a New Trial, p. 14. Presumably, the government means a "different conclusion" at the trial just completed.

Although the present state of law is not a model of clarity, the government's proposal strikes this

Opinion of Lawrence W. Pierce, D.J. re: Motion for New Trial, Dated June 12, 1974

Court as more liberal than required, for two reasons. First, the oft-cited footnote in *United States* v. *DeSapio*, 435 F.2d at 286 n. 14, seems to indicate that unless there has been prosecutorial misconduct shown, the analysis need not look to the probable effect of the new evidence had it been available in the past trial, but only to whether it would probably affect the result at a new trial. This is important in this case because Glasser's present explanation renders the new evidence worthless, as a practical matter, at any retrial. The new evidence could have been used with maximum impact only at the past trial.

Second, the government has said that the new evidence need lead only to a different "conclusion" not a "different verdict." Both *DeSapio* and *Marquez* require only the latter. In a close case, the difference between "conclusion" or "result" and "verdict" is critical. For instance, in this case it is extremely doubtful that the new evidence would precipitate a "different verdict," that is, an acquittal, in a retrial or the trial just past. But, it is quite possible that it might have swayed at least one juror in the past trial, and thus resulted in a mistrial. That would have been a "different conclusion" as this Court interprets the word.

APPENDIX D

----------x

UNITED STATES OF AMERICA, :

-v- :

GEORGE STOFSKY, et al., : 73 Cr. 614

Defendants. :

----------x

LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

Following jury verdicts of guilty on February 28, 1974 of various counts in an indictment the defendants herein moved on April 22, 1974 for a new trial based on newly-discovered evidence concerning the personal finances of the government's chief witness, Jack Glasser. More precisely, it was alleged that it had been discovered that during the years 1967 through 1970 Glasser and his wife had deposited over $57,000 in a series of frequent cash transactions in three separate New York banks. The defendants argued that this evidence demonstrated that Jack Glasser had committed perjury during the trial. Moreover, this was said to bolster the defense theory that while it appeared that Glasser had indeed accepted payments from various manufacturers no portion of these payments had in fact been turned over to the defendants. Rejecting the suggestion

of prosecutorial misconduct, this Court held that the new evidence--the key to which was in defense counsel's hands during the trial--was insufficient to support the conclusion that a new trial had to be granted.

Based on additional information, also concerning the Glassers' finances, the defendants have again moved for a new trial. It appears that the Glassers' deposits in various checking and savings accounts exceeded the amounts previously disclosed during the first motion for a new trial. The defendants also urge that a finding of prosecutorial misconduct be made since it appears that at least portions of this additional information were in the government's possession while the first new trial motion was being considered and that, on these grounds, a new trial be granted.

The Charge of Governmental Suppression

There is no question but that while the first new trial motion was sub judice the government had in its possession material which arguably was pertinent to the disposition of that motion. Indeed the government has acknowledged that at least some of these records had some "conceivable . . . significance." Affidavit in Opposition, ¶4 at 3. Nevertheless, the government unilaterally decided not to make a "piecemeal" disclosure of any of this material. While there has been no showing that the course adopted here was not taken in good faith--in fact, the opposite appears to be the case--the

Court thinks that such a course clearly was highly inappropriate and that the failure to disclose the records--no matter how incomplete--constituted an error in judgment. See United States v. Rosner, Slip Op. Docket No. 74-2290 at 3269 (2d Cir. April 29, 1975). However, this Court does not agree with the position pressed by the defendants that the government's deliberate decision not to disclose the incomplete records discovered after the end of the trial ipso facto warrants the application of a standard different from that used in ruling on the first motion for a new trial. The issue, rather, is whether there was an prejudice to the defendants. United States v. Rosner, supra. As the lower Court stated in Rosner: "Where post-trial suppression is alleged . . . the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made." United States v. Rosner, 72 Cr. 782, Slip Op. at 23 (S.D.N.Y. Aug. 15, 1974).

Here the defendants have totally failed even to allege any prejudice. The government sua sponte revealed all the information it had to the defendants and agreed to have the appellate process stayed pending the renewal of the new trial motion before this Court. The defendants have now had an opportunity to fully air all their contentions based on all the evidence available. In short, the Court finds that the government's failure to disclose the material in question, while regrettable, did not prejudice the defendants and accordingly this

aspect of the motion is denied.

The New Evidence

As noted, the new evidence concerns the Glassers' personal finances. Whereas it appeared at the first new trial motion that the Glassers had made cash deposits from 1967-1970 amounting to nearly $58,000 now it appears that the deposits made, whether in cash or checks, totalled--as the government concedes--over $157,000 during the periods from January 1, 1962 through December 31, 1973. It is clear that Glasser's testimony at trial concerning the source of his wealth, that is, that it was derived in the main from an inheritance left to his wife, was untruthful. As the Court concluded in its first opinion Glasser "has engaged in an effort to conceal information, and has given false, or deliberately misleading testimony with respect to the source of his savings." United States v. Stofsky, Slip Op. at 11-12. The material submitted to this Court on this new trial motion strongly reaffirms this conclusion but adds nothing substantively different to what was presented in the first motion for a new trial. In short, it is more of the same. Whether Glasser had secreted $58,000 or $157,000 dollars in his checking and savings accounts as such would in this Court's view have little significance at a new trial. Glasser's testimony concerning the source of his savings was directly impeached during the trial of these defendants

and additional evidence on this point "would not have changed the quantum of the impeaching effect." Stofsky, supra at 22.

The Court is not unmindful of the defense theory that Glasser retained all the payments from the manufacturers and the further allegation that the amounts of the deposits demonstrate this fact. However, as the Court pointed out before in denying the first motion for a new trial, the size of the deposits do not at all necessarily establish that Glasser kept all the payments. A more reasonable and more damaging explanation would be that the extent of the scheme involving the defendants was far more widespread than previously known. Moreover, the defense theory was fully presented during the trial and apparently rejected by the jury.

The motion for a new trial is hereby denied for the reasons stated herein and in this Court's Opinion dated June 12, 1974. 1/

SO ORDERED,

Dated: New York, New York
June 4, 1975

LAWRENCE W. PIERCE
U.S.D.J.

Nos. 75-1541 and 75-1554

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES HOFF AND CLIFFORD LAGEOLES, PETITIONERS

v.

UNITED STATES OF AMERICA

GEORGE STOFSKY AND AL GOLD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Page

Cases (continued):

Statutes and rule:

Page

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1541

CHARLES HOFF AND CLIFFORD LAGEOLES, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 75-1554

GEORGE STOFSKY AND AL GOLD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a)[1] is reported at 527 F. 2d 237. The opinions of the district court (Pet. App. 27a-50a), denying petitioners' motion for a new trial, are unreported.

---

[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75-1541.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1975, and a petition for rehearing and suggestion of rehearing *en banc* was denied on February 26, 1976. On March 18, 1976, Mr. Justice Marshall extended the time for filing the petitions for a writ of certiorari to and including April 26, 1976. The petition in No. 75-1541 was filed on April 23, 1976, and the petition in No. 75-1554 was filed on April 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioners' motion for a new trial based on allegedly newly discovered evidence.

2. Whether the government deprived petitioners of a fair trial by failing to produce copies of a witness' federal income tax return before trial, where there had been no pretrial request for the document and petitioners received the document during trial.

3. Whether the evidence that petitioners were members of a single conspiracy was sufficient to support their convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners (officials of a furriers union) were convicted of conspiracy to demand and accept payments of money from union employers and to conduct the union's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 371, and on several counts of accepting payments of money from specified union employers, in violation of 29 U.S.C. 186(b) and 18 U.S.C. 2. In addition, petitioners Stofsky and Gold were convicted of conducting the affairs

of the union through a pattern of racketeering activity, in violation of 18 U.S.C. 1961(1)(B) and (C) and 1962(c), and of corruptly endeavoring to influence a witness before a federal grand jury, in violation of 18 U.S.C. 1503, and petitioners Stofsky, Hoff, and Gold were convicted on several counts of attempting to evade federal income taxes, in violation of 26 U.S.C. 7201. Each petitioner was sentenced to imprisonment and fine.[2] The court of appeals affirmed (527 F. 2d 237; Pet. App. 1a-23a).

1. The evidence at trial is set forth in detail in the opinion of the court of appeals (Pet. App. 1a-9a). In brief, it showed that petitioners, who were officers and employees of the Furriers Joint Council of New York, a labor union representing fur workers in the New York area, corrupted the conduct of that union's affairs for personal gain from 1967 to 1971. During that period of time, petitioners received and conspired to receive cash payoffs from certain fur manufacturers in return for permitting those manufacturers to violate provisions of the collective bargaining agreement prohibiting subcontracting to non-union shops and restricting overtime work.

To establish petitioners' roles in this scheme, the government relied primarily on the testimony of Jack Glasser, a labor adjustor employed by the fur manufacturers'

---

[2]Petitioner Stofsky was sentenced to three years' imprisonment and a $13,000 fine; petitioner Hoff was sentenced to three years' imprisonment and a $12,000 fine; petitioner Gold was sentenced to two years' imprisonment and a $10,000 fine; and petitioner Lageoles was sentenced to two years' imprisonment, with execution of sentence suspended, placed on probation for two years, and fined $2,000 (App. 780a-790a). On July 12, 1976, the district court reduced petitioner Gold's sentence to seven months' imprisonment and a $10,000 fine, and he has now been released from custody. "App." refers to the joint appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

association.[3] Because Glasser's duties brought him in virtual daily contact with many union officials as well as with fur manufacturers within his district (Tr. 91-92), he was in a unique position to serve as the conduit between those manufacturers who sought to bribe union officials for permission to violate the collective bargaining agreement and those well-placed union officials who could provide the assurance that such violations would go unnoticed or be tolerated.

Glasser testified that he had periodically received payoffs from different fur manufacturers from 1967 to 1971, retaining a share for himself and delivering the rest to one or more of the petitioners (Tr. 113-129, 135-136, 142-164, 180-208, 332-340, 965-966). Following the payment of these bribes, the manufacturers received preferential treatment from the union in its enforcement of contract provisions (Tr. 157, 183, 191, 201, 211, 511, 585-586, 708-709, 906-907, 917-919, 1249-1252, 1635-1640). While union agents who were unaware of the illegal scheme would occasionally file complaints charging violations of the labor agreement, the complaints either were suppressed by the petitioners or disposed of through the levying of token fines (Pet. App. 6a).

Glasser's testimony about this payoff scheme was substantially corroborated by the testimony of three fur manufacturers who had made payoffs either directly to petitioners or through intermediaries (Tr. 497-511, 568-585, 670-671, 685-692, 697-702, 709-717, 720-723, 904-911), by a former union business agent who had accepted payoffs in exchange for overlooking breaches of the agreement's provision against non-union sub-contracting (Tr. 983-992), and by two attorneys who had been asked by some of the petitioners to assist in furnishing legal

---

[3]Glasser testified under a grant of transactional immunity.

advice to Glasser after the government's investigation into the payoffs had commenced (Tr. 221-226, 281-287, 552-560, 952, 958-960).

2. Petitioners did not seriously dispute that Glasser had received payoffs from certain manufacturers. Rather, they contended that any payments received by Glasser were retained by him and were never shared with them. On the first day of trial, petitioners obtained by subpoena Glasser's 1972 federal income tax return, which declared $6,151 in interest payments from deposits of roughly $120,000 in several savings banks. When cross-examined as to the source of the $120,000, Glasser testified that most of that money had been inherited by his wife and had been deposited in savings accounts some 20 years earlier (Tr. 415, 420-422, 970). Glasser further testified that from 1967 to 1969 he had received approximately $15,000 to $16,000 in illegal payoffs from the union manufacturers, some $5,000 of which he had retained (Tr. 423). These explanations were corroborated by the testimony of Glasser's wife (Tr. 468-475).

Five or six days before the close of their case (App. 701a, 769a), petitioners received a transcript of the Glasser accounts at the East New York Savings Bank, which showed that the Glassers had deposited more than $38,000 in the savings account during the years 1967-1970. Although this transcript would have impeached the testimony of Glasser and his wife that an inheritance had been the source of their savings and might have supported petitioners' allegation that Glasser had pocketed the entire amount of any payoffs he had received from manufacturers, petitioners chose not to offer it into evidence. Nor did they use it in questioning Glasser about his tax returns or request that Glasser be recalled for further cross-examination. Instead, petitioners introduced probate records of the estates of Mrs. Glasser's parents to establish that she had

only inherited approximately $2,800 upon the death of her mother and father (Tr. 956, 967, 1767-1769). Petitioners argued to the jury the clear contradiction between the probate records and Glasser's trial testimony (Tr. 1815-1816).

3. On April 22, 1974, several weeks after trial, petitioners filed a motion for a new trial on the grounds of newly discovered evidence. Petitioners claimed that records of Glasser's accounts in several banks showed approximately $57,000 in cash deposits during 1967-1970 (including the $38,000 deposited in the East New York Savings Bank) and that this evidence established that Glasser had kept the entire amount of any monies received from fur manufacturers during that period. Petitioners alleged that Glasser therefore had perjured himself at trial when he testified that he had given part of the payoffs to the petitioners, that most of the $120,000 in his savings accounts had come from his wife's inheritance, and that he had retained only $5,000 out of approximately $15,000 in bribes, which he had spent and not banked (App. 703a).

In response to petitioners' motion, the government submitted affidavits from officials of the banks in which Glasser maintained savings accounts, stating that their record of Glasser's accounts would have been available to petitioners on two to four days' notice if petitioners had served a trial subpoena for them (App. 752a-762a). In addition, the government stated that it had reinterviewed Glasser on several occasions in May 1974 and that Glasser had reaffirmed the truthfulness of his trial testimony that he had paid petitioners portions of the monies extorted from various fur manufacturers. When questioned about the source of his savings deposits during the years 1967-1970, however, Glasser informed the government, for the first time, that he had received additional

illegal payoffs from manufacturers, other than those mentioned at trial, that he had kept a portion of these additional payoffs, and that he had passed on the remainder of each payoff to one or more of the petitioners. Furthermore, Glasser and his wife admitted that their trial testimony concerning Mrs. Glasser's inheritance had been false (App. 742a-749a).

On June 12, 1974, the district court denied petitioners' motion for new trial. Although concluding that Glasser "ha[d] engaged in an effort to conceal information, and ha[d] given false or deliberately misleading testimony with respect to the source of his savings" (Pet. App. 34a), the court held that there had been no government misconduct in the case (Pet. App. 38a) and that it was unlikely that the jury would have reached a different verdict if it had been aware of the new evidence (Pet. App. 39a):

> The new evidence * * * does not directly address Glasser's testimony with respect to payments to the [petitioners], nor does it lead inevitably to the conclusion that Glasser lied about the pay-offs to the [petitioners]. It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori,* a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the [petitioners]. On the contrary, the figures alone are so incongruous as to lead to no conclusion at all.

Furthermore, the trial court held that since Glasser's explanation of the source of the funds further implicated petitioners in the payoff conspiracy, the "newly discovered" bank records might not even be used at a second trial (Pet. App. 40a, 44a). Finally, the court found that there was substantial other evidence before the jury to

impeach Glasser's inheritance story and that the new evidence was therefore largely cumulative (Pet. App. 40a-41a).

After the denial of petitioners' motion for new trial, the government renewed its investigation of the fur manufacturing industry and of Glasser's finances. The investigation revealed discrepancies in Glasser's post-trial explanation of the source of his bank deposits and also established that Glasser had received payoffs over a longer period of time (1962-1973) than he had previously admitted (S. App. 52a, 67a-69a).[4] By letter dated September 3, 1974, the government informed petitioners' counsel of these inconsistencies and stated that all of Glasser's financial records obtained during the investigation were available for their inspection.

Petitioners again moved for a new trial, asserting that the new evidence cast further doubt on Glasser's credibility and that the government had deliberately suppressed pertinent information received by it during the pendency of the first new trial motion (S. App. 9-10, 14-17). The district court denied petitioners' motion, stating that the additional evidence added "nothing substantively different to what was presented in the first motion for a new trial" and that it "would not have changed the quantum of the impeaching effect" (Pet. App. 48a, 49a). The court of appeals affirmed in a thorough opinion on which we largely rely (Pet. App. 1a-23a).

ARGUMENT

1. Petitioners contend (Pet. No. 75-1541, pp. 13-22) that the court of appeals erred in denying their motion for a new trial based on the "newly discovered" evidence of

[4]"S. App." refers to the supplemental joint appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

Glasser's perjury. Specifically, petitioners allege that the lower courts considered their motion under a standard that differs from the test, first articulated in *Larrison* v. *United States,* 24 F. 2d 82, 87 (C.A. 7), that has been applied by other courts of appeals. These claims are baseless. As the Second Circuit correctly noted (Pet. App. 15a-18a and n. 10), any differences among the circuits regarding the proper standard for judging a new trial motion are formal rather than substantive, and under neither test were petitioners entitled to relief.

a. It is fundamental that a defendant who seeks a new trial under Rule 33, Fed. R. Crim. P., "must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello,* 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937. See also *United States* v. *Anderson,* 509 F. 2d 312, 327, n. 105 (C.A. D.C.), certiorari denied, 420 U.S. 991; *United States* v. *Meyers,* 484 F. 2d 113, 116 (C.A. 3); *United States* v. *Strauss,* 443 F. 2d 986, 989 (C.A. 1), certiorari denied, 404 U.S. 851. Indeed, *Larrison,* on which petitioners principally rely, also requires that "the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial" (24 F. 2d at 88).

Here, however, the transcript of Glasser's East New York Savings Bank account had been delivered to petitioners six days before the close of trial. As noted above (see p. 5, *supra*), this transcript—which showed large deposits during the years 1967-1970—was strong evidence that Glasser had lied about the source of his savings and might have reinforced substantially petitioners' argument that Glasser had retained the entire amount of any payoffs he received. Nevertheless, petitioners made no use of the transcript at trial.

Similarly, eight days before the trial concluded petitioners received Glasser's tax returns for the years 1967-1971, which indicated additional interest payments from two other banks during the period covered by the indictment, yet they made no attempt during trial to obtain records of these accounts.[5] Indeed, not until April 10, 1974, more than one month after trial, did petitioners subpoena the bank records that led to the "newly discovered evidence" alleged in their motion.

In these circumstances, the district court correctly concluded that "the key to the 'new' facts was in defense counsel's hands from the moment Glasser was cross-examined about his 1972 tax return early in the trial, or at the latest when counsel finally viewed the transcript of the East New York Saving Bank accounts on February 21, 1974, and saw that $38,000 (almost a third of what Glasser had earlier told him represented the total Glasser fortune) had been deposited in frequent transactions from 1967 through 1970" (Pet. App. 35a). As the court of appeals also noted (Pet. App. 13a-14a):

> By recalling the witnesses to the stand, the defense could have used the transcript to recall and cross-examine the Glassers. If more time was needed to obtain additional information from the banks in question, the defense could at least have brought this predicament to the trial judge's attention and requested a continuance in order to exploit further this "strong evidence."
>
> The failure to obtain and exploit the impeaching data until after the jury had rendered its verdict offers strong support for the government's contention

[5]Officials of the banks subsequently stated that they could have supplied the materials to petitioners within two to four business days if they had been served with a trial subpoena. See p. 6, *supra*.

> that the defense did not exercise due diligence in obtaining the newly-discovered impeaching evidence in time for use at trial.

b. Even assuming petitioners exercised the required diligence, their motion for new trial was properly denied. It is important to re-emphasize that the precise subject of Glasser's false testimony was the source of his substantial savings, not petitioners' complicity in the crimes alleged in the indictment. Although Glasser stated at trial that his wealth was attributable to his wife's inheritance, his post-trial admission was that the money represented his share of additional payoffs from fur manufacturers—payoffs in which petitioners also shared. At no time did Glasser ever recant his trial testimony that petitioners conspired with him to extort and receive bribes from union employers and that they did in fact receive such bribes.

The record supports the conclusion of both lower courts that this "newly discovered" evidence "would probably [not] produce a different verdict" (Pet. App. 10a, 14a-16a, 41a-42a). First, as just noted, Glasser's perjury was collateral to the fundamental disputed issue at trial—whether petitioners received the payoffs alleged in the indictment. The court of appeals correctly observed (Pet. App. 17a):

> It is a *non sequitur* to suggest that the discovery of Glasser's receipt of larger sums of money from some source establishes that he did not pass to [petitioners] a share of what he concededly received from the fur manufacturers. The key factual issue in dispute—whether Glasser shared payments with the [petitioners]—would not have been affected one way or the other by this new evidence.

Unquestionably, the evidence of the previously undisclosed payoffs would have severely shaken Glasser's

testimony about his wife's inheritance—testimony that had been elicited only on cross-examination—but that story already had been substantially discredited at trial by petitioners' introduction of the probate records pertaining to Mrs. Glasser's parents.

Moreover, while Glasser's post-trial admissions of new payoffs might have affected his general credibility, petitioners could have introduced the new evidence for its impeachment value only at a high cost to their defense, since Glasser's explanation implicated petitioners even further in the payoff scheme. Indeed, both the district court (Pet. App. 40a) and the court of appeals (Pet. App. 18a) thought it doubtful that defense counsel at a new trial "would find it beneficial to open the door to this evidence of possible further union corruption."[6] Finally, as recounted in our statement of facts and as expressly found by the courts below, there was substantial independent evidence corroborating Glasser's account of the payoffs to petitioners. In view of the favorable treatment received from the union by those manufacturers who made payments to Glasser, the inference is inescapable that Glasser turned over part of the bribes to the petitioners.

Relying on *Larrison* v. *United States, supra,* 24 F. 2d at 87, petitioners assert that the court of appeals should have ordered a new trial if, without the perjury, "the jury *might* have reached a different conclusion." But, "assuming * * * that 'might' means something more than an outside chance," *Kyle* v. *United States,* 297 F. 2d 507, 512 (C.A. 2), certiorari denied, 377 U.S. 909, we

[6]See also *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 357, where this Court refused to hold that "any subsequently discovered inaccuracy in the testimony of an important trial witness, which might have affected his credibility in the eyes of the jury, would entitle a convicted defendant to a new trial."

submit that a new trial would have been denied here even if the *Larrison* rubric had been followed. In fact, as the Second Circuit noted (Pet. App. 15a and n. 9), any differences among the courts of appeals on this issue may be largely semantic. In only one of the decisions cited by petitioners as following *Larrison* was a new trial granted because of newly discovered evidence of perjury, and the circumstances of the perjury in that case would have satisfied any defensible standard under Rule 33.[7] Under any formulation of the appropriate test, therefore, petitioners' motion for a new trial was properly denied.[8]

2. Petitioners claim (Pet. No. 75-1541, pp. 22-25) that the government violated its obligations under *Brady* v.

[7]This absence of conflict in result casts doubt on petitioners' assertion of the importance of this question. Indeed, this Court in past Terms has denied review of several Second Circuit decisions raising or suggesting a conflict with *Larrison.* See, *e.g., United States* v. *Schwartzbaum,* 527 F. 2d 249 (C.A. 2), certiorari denied, No. 75-819, March 1, 1976; *United States* v. *Rosner,* 516 F. 2d 269 (C.A. 2), certiorari denied, No. 75-492, June 30, 1976; *United States* v. *Marquez,* 490 F. 2d 1383 (C.A. 2), certiorari denied, 419 U.S. 826; *United States* v. *DeSapio,* 435 F. 2d 272 (C.A. 2), certiorari denied, 402 U.S. 999.

[8]*Mesarosh* v. *United States,* 352 U.S. 1, does not require a different result. That case, whose facts are so unique that it has been termed *sui generis (United States* v. *Zane,* 507 F. 2d 346, 348 (C.A. 2), certiorari denied, 421 U.S. 910) involved a key witness in a Smith Act prosecution whose sworn accusations of Communist affiliations against numerous people "raise[d] the inference that he was either an inveterate perjurer or a disordered mind." *United States* v. *Rosner, supra,* 516 F. 2d at 279. By contrast, Glasser's challenged testimony raises no such inference and can be explained, as the court of appeals stated (Pet. App. 18a), by his desire merely to avoid tax liability. Moreover, the perjury in *Mesarosh* was crucial to the conviction; this Court expressly distinguished that situation from a motion for a new trial based on newly discovered evidence which bears on the credibility of a prosecution witness but "which is 'merely cumulative or impeaching' " (352 U.S. at 9).

Maryland, 373 U.S. 83, by failing to investigate Glasser's tax returns before calling him as a witness, to realize the "crucial importance" of those returns to the defense, and to turn them over to petitioners before trial. Even assuming that these returns, which were filed in I.R.S. archives prior to trial, were in the government's possession within the meaning of *Brady,*[9] petitioners' contentions must fail for a number of reasons. The rule announced in *Brady* applies only to "information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs,* No. 75-491, decided June 24, 1976, slip op. 5. Not only did the government not investigate Glasser's tax returns prior to trial,[10] but petitioners were as aware of the existence of those returns as the prosecutors, yet they made no *Brady* request for them (App. 795a, 802a). See *United States* v. *Agurs, supra,* slip op. 9. Furthermore, and most significant, Glasser's 1972 tax return was made available to petitioners on the first day of trial, the remainder of the returns in issue (for the years 1967-1971) were provided during trial, and the returns were used by petitioners in their cross-examination of Glasser (Pet. App. 11a-12a, n. 6). In these circumstances, as petitioners' failure to allege

---

[9]*United States* v. *Deutsch,* 475 F. 2d 55 (C.A. 5), is inapposite. *Deutsch,* which dealt with the attempted bribery of a post office employee, held that the government could not defeat a *specific* pretrial request for production of the personnel file of the bribed postal worker by asserting that the file was in the possession of the Postal Service rather than the prosecution.

[10]The court of appeals correctly rejected petitioners' contention that the government acted in bad faith or was negligent in failing to investigate Glasser's finances more diligently before calling him as a witness. "[T]he government, in February 1974," noted the court, "did not have reason to believe that Glasser, blessed with transactional immunity, would have any incentive to engage in falsehoods concerning his own monetary affairs" (Pet. App. 11a)

prejudice illustrates, petitioners' claims of prosecutorial misconduct are insubstantial.

3. Petitioners' final assertion—that the evidence showed multiple conspiracies rather than a single conspiracy (Pet. No. 75-1541, pp. 25-28)— is also without merit. The test for determining whether the evidence established a single conspiracy is "whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end." *Koolish* v. *United States,* 340 F. 2d 513, 524 (C.A. 8), certiorari denied, 381 U.S. 951. As the Court noted in *Blumenthal* v. *United States,* 332 U.S. 539, 559, the crucial question is whether the alleged conspirators had "knowledge of the plan's general scope, if not its exact limits, [and] sought a common end." See also *United States* v. *Cirillo,* 499 F. 2d 872, 887 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Perez,* 489 F. 2d 51, 61-62 (C.A. 5), certiorari denied, 417 U.S. 945.

The court of appeals correctly concluded that, when viewed in the light most favorable to the government, the proof established beyond a reasonable doubt that petitioners had entered into a single conspiracy with a common objective—to accept illegal payoffs from fur manufacturers in return for permitting those employers to violate terms of the collective bargaining agreement with the union (Pet. App. 20a-21a):

> Each of the [petitioners] appreciated that the illegal arrangements and payoffs to which he was a party were part of this ongoing scheme involving others. As responsible officials of the Union, [petitioners] shared interrelated duties and worked closely together. Their participation over a period of time in the corrupt scheme was evidenced by numerous acts, including the joint approval by Stofsky and Gold of Grossman's

> [a fur manufacturer] violations of the Union agreement, the involvement of Hoff in the same violations, the association of each [petitioner] with payoffs made by more than one fur manufacturer, Gold's statements to Grossman indicating knowledge of payoffs by others, [and] the joint determination of Hoff and Lageoles not to prosecute certain contracting complaints or to conduct the examination of certain fur manufacturers' books * * * .

Furthermore, the existence of the single conspiracy was evidenced by meetings in early 1972 at which petitioners Stofsky, Gold and Hoff sought to persuade Glasser not to reveal details of the payoff scheme to federal investigators (Tr. 292-230, 263-289, 379-386).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
HOWARD WEINTRAUB,
Attorneys.

JULY 1976.

---

[11] *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioners principally rely, is distinguishable. In that case, which involved 32 defendants, 19 of whom were brought to trial, the government conceded that the evidence failed to prove the single conspiracy alleged in the indictment and did not dispute that eight or more different conspiracies had been proven. The trial judge nevertheless refused to give a multiple conspiracy instruction.